SUPREME COURT, U. S.

FILED
JUN 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 256

CADDO PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondents,

• • •

No._____

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondents,

• • •

No._____

JACKSON PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

MARGARET M. JOHNSON, ET AL.,
Respondents,

• • •

No._____

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

versus

YVORNIA DECAROL BANKS, ET AL.,
Respondents,

• • •

No._____

CITY OF MONROE, LOUISIANA, ET AL.,
Petitioners,

versus

JIMMY ANDREWS, ET AL.,
Respondents.

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

• • •

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The orders of the District Courts below are printed in Exhibits, A, B, C, D and E[1] and the original opinion of the United States Court of Appeals for the Fifth Circuit found in Vol. VIII on pages 17-169 and 172-173. The opinion on Rehearing is found on pages 244-327 of Volume VIII of the transcript of record.[2]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on December 29, 1966 and is contained in transcript of record, Vol. VIII, pp. 174-179. Application for rehearing was made and the same was granted on February 9, 1967, Vol. VIII, pp. 237-239. The Court later allowed oral argument on the said re-

[1]Caddo, transcript Vol. 1, pp. 291-298; 303-304, Exhibit A; Bossier, transcript Vol. 3, pp. 251-258, 261-262, Exhibit B; Jackson, transcript Vol. 4, pp. 47-52, Exhibit C; Claiborne, transcript Vol. 5, pp. 45-52, Exhibit D; Monroe, transcript Vol. 6, pp. 63-69, Exhibit E.

[2]The original opinion and opinion on rehearing of the Fifth Circuit are printed as Exhibit L.

hearing, Vol. VIII, pp. 240-242. On March 29, 1967 the Court issued an opinion affirming and slightly modifying the original opinion, transcript of record, Vol. VIII, pp. 244-327 and issued its judgment in accordance therewith, Vol. VIII, pp, 328-333.[3]

The jurisdiction of this Court is envoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Does the "equal protection" clause of the Fourteenth Amendment place upon school officials the affirmative duty to correct racial imbalance resulting from innocent school administration or voluntary choice?

II. If the "equal protection" clause of the Fourteenth Amendment requires racial balancing as indicated by the decision of the court herein, does this requirement apply nationally or only sectionally?

III. Does a non-desegregated faculty per se violate constitutional rights of students or is such a situation one that requires proof of the denial of equal protection?

IV. If a non-desegregated faculty is constitutionally impermissible, does the Constitution require a racial balancing of the faculty, with the burden of accomplishing the same on school administrators?

V. Does national policy as established by congressional action require or support the decision in this case?

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[3]For reference to original opinion and opinion on rehearing see footnote 1.

VI. Can rules established by Congress or by administrative fiat, for the purpose of qualifying for federal funds become basic minimal constitutional standards?

VII. Does the decree issued by the Fifth Circuit violate the express mandate issued by this Court, requiring the District Court to fashion the remedy in each case according to the circumstances and conditions prevailing?

VIII. Does the Brown decree allowing the court to retain jurisdiction permit the federal courts to experiment with school systems under its decrees, or is the retention of said jurisdiction limited to approving a method for desegregation?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction "thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proc-

ess of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Inferentially, the Civil Rights Act of 1964 is closely interwoven, therefore, the pertinent provisions thereof will be found printed in Exhibit G.

STATEMENT OF THE CASE

Petitioners are five Louisiana School Boards and officers thereof, charged under the laws of the State with the duty of operating the schools within their jurisdiction.[4] Each of the school systems had been enjoined from discriminating with regard to school attendance or school assignment. Each of the systems were in the progress of desegregating pursuant to plans approved by the District Court.

In the summer and fall of 1965 the United States District Court for the Western District of Louisiana approved a plan for each of the school districts.[5] Each of these plans provided for complete desegregation of each and every grade by the commencement of the 1967-68 school year. Each of the plans approved consisted basically of a freedom of choice available to each student subject to certain administrative restrictions not racially motivated. The original plaintiffs and/or the United States, appearing as intervenor, appealed each order, apparently feeling that the plans left too much of school administration to the school boards and that a

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[4]All of the boards operate schools with their respective Parishes (Counties) except the Monroe School System which encompasses only a part of a parish.

[5]Caddo, August 3, 1965, tr. Vol. I, pp. 291-298, 303-304; Bossier, August 20, 1965, tr. Vol. III, pp. 251-258, 261-262; Jackson, October 27, 1965, tr. Vol. IV, pp. 47-52; Claiborne, October 11, 1965, tr. Vol. V, pp. 45-52; Monroe, November 2, 1965, tr. Vol. VI, pp. 63-69.

valid plan should spell out as nearly as possible the solution to all questions as well as they very language of communications between the schools and the students.

It is important to note that the administration of the approved plan was not attacked at that time or at any date up to the present date.

On December 29, 1966, the United States Court of Appeals for the Fifth Circuit in a 2 - 1 decision, issued an opinion and a decree from which your petitioners applied for rehearing. A rehearing was granted and on March 10, 1967, the Court en banc heard oral argument thereon. On March 29, 1967, said Court of Appeals in an 8 - 1 - 3 decision rendered an opinion adopting with clarifying statements the opinion of December 29, 1966, and with minor changes to the decree of December 29, 1966. The Court further stated that the mandate would issue immediately.

Applications for a stay pending application for certiorari was made to the United States Court of Appeals for the Fifth Circuit as well as to this Court,[6] both of which were denied.

I.

DOES THE "EQUAL PROTECTION" CLAUSE OF FOURTEENTH AMENDMENT PLACE UPON SCHOOL OFFICIALS THE AFFIRMATIVE DUTY TO CORRECT RACIAL IMBALANCE RESULTING FROM INNOCENT SCHOOL ADMINISTRATION OR VOLUNTARY CHOICE?

Again this Court is presented the opportunity to determine whether the Fourteenth Amendment demands af-

[6] See Exhibit K.

firmative action on behalf of school officials to eliminate racial imbalance.[7] The only difference between this and earlier cases is the side of the coin involved. Here the decision of the Court of Appeals finds that such a duty exists where the others rejected it.

The attitude of this issue as it reaches the Court is clearly spelled out in the original decision of the Fifth Circuit and the opinion on rehearing. For purposes of clarity they will be referred to hereinafter as Jefferson I and Jefferson II.

The "meat of the coconut" is succulently set out in the opinions.

> "The only school desegregation plan that meets constitutional standards is one that works. * * *" Jefferson I, P. 7.

The determinative factor in a workable plan is the proported duty of the school board to :

> "disestablish dual, racially segregated school systems and to achieve substantial integration within such systems." Jefferson I, P. 115.

If the racial mixing does not occur then the school board must proceed as follows:

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[7]This issue was directly presented to this Court in *Bell v. School City of Gary*, cert. denied 377 U.S. 924 (1965). Questions presented:

I. Does the Fourteenth Amendment require a school board, which administers a compulsory public school system wherein virtually all the Negro students are confined to schools that are totally or predominantly Negro and virtually all the white students are confined to schools that are totally or predominantly white, to take steps, consistent with sound and rational education administration, to remedy that situation?

II. May a school board, consistent with requirements of equal educational opportunities mandated by the Fourteenth Amendment, acquiesce in the existence of a segregated or racially imbalanced school system which it administers?

> "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opporunities." Jefferson I, P. 115.

1. The Court sitting en banc adopts the the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion. Jefferson II, P. 4.

The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools — just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. Jefferson II, P. 5.

While the Court has not, as of this date, established any fixed percentage or formula by which to determine when a plan works, the lack of a standard does not alter the principle. Some standard, yet to be established, must be met or desegregation has not occurred and the school officials must concoct a new system to achieve the required "integration".

5. The percentages referred in to the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools. Jefferson II, p. 6.

Despite a disclaimer insofar as racial balancing is concerned, the result is the elimination of racial imbalance regardless of the name placed on it.

Numerous circuits of the United States have had the opportunity to pass on the question of the duty to eliminate racial imbalance not purposefully created.

The first class of cases deals with situations where students are involuntarily assigned to schools because of geographic zones established by school officials. Where the plaintiffs have been unable to show bad intentions on the part of the school officials this adventitious or innocent racial imbalance has been held to be constitutionally permissible.

In the First Circuit the Court overruled a decision of the district court which ordered the school board to correct innocent racial imbalance.

> "Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. We can accept no such constitutional right. Cf. *Bell v. School City of Gary*, 7 Cir., 1963, 324 F.2d 209, cert. den. 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Downs v. Board of Education*, 10 Cir., 1964, 336 F.2d 988, cert. den. 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800." *Springfield School Committee v. Barksdale*, 348 F.2d 261, 264 (1965).

The Third Circuit when confronted with a desegregation plan used the terms "desegregation" and "integration" interchangably as does the majority opinion herein; however, qualified its understanding of the term as follows.

> "Eventually a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children, whether white or Negro, whose attendance at school is required by law at public schools, 14 Del.C. Section 2702, will attend public schools without regard for race or color" *Evans v. Ennis*, 281 F.2d 385, 391 (1960).

This was further amplified when the Court found that its language had been interpreted to mean mandatory mixing.

> "It was not our intention, nor is it our intention now, to exempt the respective individual

infant plaintiffs who may presently actively seek integration from the usual processing of the school system relating to their capabilities, scholastic attainments and geographical locations, provided always that that processing is conducted on a racially non-discriminatory basis. Such processing must, of course, be applied to all children in a well regulated public school system." *Evans v. Ennis*, 281 F.2d 385, at page 395 (1960).

When the question of racial imbalance was raised before the Fourth Circuit the Court disposed of the question in the following manner.

"On this phase of the case, the principal complaint of the plaintiffs appears to be that the zoning of the schools has not produced a greater mixture of the races than it has. There are still some all white schools; there are still some all Negro schools, and, though the number of those have been declining, there is no reason to think that some of them will not remain in the school year 1966-1967. The plaintiffs contend the lines should have been drawn with the conscious purpose of eliminating as many of such schools as possible and of achieving a maximum intermixture of the races.

Whatever the Board may do in response to its own initiative or that of the community, we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population. The Constitution permits the Board to consider natural geographic boundaries, accessibility of particular schools and many other factors which are unrelated to race. So long as the boundaries are not

> drawn for the purpose of maintaining racial segregation, the School Board is under no constitutional requirement that it effectively and completely counteract all of the effects of seggregated housing patterns." *Swann v. Charlotte-Mecklenburg Board of Ed.*, 369 F.2d 29, 32 (1966).

When presented with the identical racial imbalance question the Sixth Circuit followed the main stream of judicial expression when it held.

> "Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation.
>
> * * * *
>
> We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause nor is there a like duty to select new school sites solely in furtherance of such a purpose." *Deal v. Cincinnati Board of Ed.*, 369 F.2d 55, 60 (1966).

In addition to the circuits enumerated above the Seventh and Tenth Circuits have, when faced with identical legal questions, disclaimed the concept of the constitutional duty to eliminate or reduce racial balance innocently conceived.

> "The situation in *Brown* is a far cry from

the situation existing in Gary, Indiana. The School District boundaries in Gary were determined without any consideration of race or color. We agree with the argument of the defendants stated as 'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.'

After the original opinion in *Brown v. Board of Education*, supra, the Court set the case for further argument on the question of how its decision should be implemented. Thereafter, a three-judge district court was designated in Kansas to consider the Kansas aspects of the instructions in the *Brown* case. That Court stated, *Brown v. Board of Education*, D.C., 139 F.Supp. 468, 470, "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."

In *Briggs v. Elliott* (EDSC), 132 F.Supp. 776, 777, the Court said: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.'" *Bell v. School City of Gary*, 324 F.2d 209, 213, (7th Cir., 1963) (cert. denied 377 U.S. 924 (1965).

"Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of *Brown v. Board of Education*, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there

seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them. *Kelley v. Board of Education of City of Nashville*, supra; *Stell v. Savannah-Chatham County Board of Education*, 5 Cir., 333 F.2d 55; *Evers v. Jackson Municipal Separate School District*, 5 Cir., 328 F.2d 408; *Boson v. Rippy*, 5 Cir., 285 F.2d 43; *Holland v. Board of Public Instruction*, 5 Cir., 258 F.2d 730; *Avery v. Wichita Falls Independent School District*, 5 Cir., 241 F.2d 230, cert. denied, 353 U.S. 938, 77 S.Ct. 816, 1 L.Ed2d 761; *Bradley v. School Board of City of Richmond, Virginia*, 4 Cir. 317 F.2d 429; *Jeffers v. Whitley*, 4 Cir., 309 F.2d 621.

Moreover, the question was conclusively answered in *Bell v. School City of Gary, Indiana*, 7 Cir., 324 F.2d 209, 213, cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216, where the court held that * * * "'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils.'" *Downes v. Bd. of Ed. of Kansas City*, 336 F.2d 988, 998, (10th Cir. 1964).

Each of the six circuits obviously have found no constitutional duty to eliminate racial imbalance where innocently conceived.[8] In each of these cases the imbal-

[8]Other cases have taken steps to eliminate racial imbalance where the same resulted from gerrymandered attendance zones or other purposeful, bad faith actions. *Clemons v. Bd. of Ed.*, 228 F.2d 853 (6th Cir.) cert. denied; 350 U.S. 1006 (1956); *Taylor v. Board of Education* 294 F.2d 36 (2nd Cir.) cert. denied 368 U.S. 940 (1961); *Dowell v. Bd. of Ed. of Oklahoma City*, Jan. 1967 (10th Cir.).

ance, even though innocently conceived, was maintained by action of school officials in adherence to geographic zone lines.

A freedom of choice plan such as those in operation in the school systems involved herein permits the greatest exercise of individual choice without artificial restrictions. This was recognized by the Sixth Circuit.

> "The principle thus established in our law is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options had been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows." *Deal v. Cincinnati Bd. of Ed.*, 369 F.2d 55, 59 (1966).

Two circuits have passed directly on the constitutionality of a freedom of choice plan honestly administered, absent a provision for elimination of racial imbalance. Both have held that a freedom of choice plan administered in good faith, and which results in voluntary racial imbalance is nevertheless constitutionally permissible. The Eighth Circuit in December of 1966 found that the constitutionality of a freedom of choice plan is determined by the good faith implementation of such a plan and not by the number of students who avail themselves of the right of choice under the plan.

> "Though the Board has a positive duty to initiate a plan of desegregation, the constitution-

> ality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school sysetm with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself." *Clark v. Bd. of Ed. of Little Rock*, 369 F.2d 661, 666.

A prior decision out of the Fourth Circuit reached the same conclusion. In that opinion that Court stated:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present

suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous.

The phrase from the second *Brown* decision to which the plaintiffs refer lends no support to their contention. The first paragraph of the opinion, in which the phrase appears, clearly and precisely expresses the proscription against 'discrimination'. There is no hint of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that each individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil in effect, assigns himself to the school he wishes to attend.

* * *

* * * As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* * * *" *Bradley v. School Bd. of Richmond*, 345 F.2d 310 (1965), reversed on other grounds 382 U.S. 103.

The rationale adopted by these various circuits are certainly not in conflict with decisions of this Court, but to the contrary, are completely harmonious therewith.[9]

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[9]*Brown v. Bd. of Education* I, 347 U.S. 843, 98 L.Ed. 873, 74 S.Ct. 686 (1954); *Brown v. Bd. of Education* II, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (1955); *Cooper v. Aaron*, 558 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958); *Goss v. Bd. of Education*, 373 U.S. 683, 10 L.Ed.2d, 632, 83 S.Ct. 1405 (1963).

II.

IF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES RACIAL BALANCING AS INDICATED BY THE DECISION OF THE COURT HEREIN, DOES THIS REQUIREMENT APPLY NATIONALLY OR ONLY SECTIONALLY?

"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this county, shall abide "*in any state*' on an equality of legal privileges with all citizens under nondiscriminatory laws." *Tahahashi .v. Fish Comm'n*, 420, U. S. 410, 420 (1948); 68 S. C. 1138, 92 L. Ed. 1478.

The Equal Protection Clause of the Fourteenth Amendment prohibits "any State" from denying any person within its jurisdiction the equal protection of the laws. The Equal Protection Clause does not specify only certain states or certain sections as being subject to its provisions, it applies to all states of the Union. It is axiomatic that if the right to have public schools racially balanced exists under the Equal Protection Clause in one state, it exists in all the states of the Union.

"Equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances . . . The guiding principle most often stated by the courts is that the constitutional guarantee of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." 16 Am. Juris. 2d Sec. 487, pp. 848-849.

"The concept of equal protection has been traditionally viewed as requiring the *uniform treatment* of persons

standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation *regardless of where they live* . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens *of all places* as well as of all races." *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362, 1383, 1384, 1385. 12 L. Ed. 2d 506.

There is an analogy between the reasoning employed in *Reynolds v. Sims*, quoted above, and the question at issue. If the equal protectoin clause demands uniform treatment with respect to legislative representation regardless of where the citizen lives, it must also demand uniform treatment of all citizens, regardless of where they live, with respect to educational opportunity.

The citizen in Cincinnati, Ohio, Gary, Indiana, Kansas City, Missouri and Little Rock, Arkansas should have neither a greater nor a lesser right to equal educational opportunity under the Fourteenth Amendment than the citizen of Monroe, Shreveport or Bossier Parish, Louisiana. Yet merely because Cincinnati, Gary, Kansas City, and Little Rock happen to be located in federal circuits which hold that the Equal Protection Clause does not require racial balancing, their citizens receive treatment with respect to educational opportunity under the Equal Protection Clause which is different from the citizens of Monroe, Shreveport, and Bossier Parish.

If a citizen moved from Cincinnati to Shreveport, would his educational rights under the Equal Protection Clause change because Shreveport happens to be located in a different federal circuit which holds that racial balancing is required?

"The equal protection clause is not concerned with desires to perpetuate political philosophies, geographical entities, historical anomolies. It is equally and impartially unconcerned with the protection of *any* minority, save one: the minority of one embodied in the individual citizen." *Butterworth v. Dempsey*, 229 F. Supp. 754, 763 (1964) aff'd 84 S. Ct. 1913 (1964); 378 U. S. 562, 12 L. Ed. 2d 1036.

Nevertheless, because of the conflicting decisions of the Fifth and Sixth Circuits on the requirement of racial balance under the equal protection clause, the irrelevant circumstance of traveling from Cincinnati to Shreveport would substantially change the individual citizen's educational rights under the Equal Protection Clause.

Obviously, this is an anomoly which should be resolved by this Court, which has always treated as self-evident the proposition that the Equal Protection Clause knows no state or sectional boundaries, but applies uniformly throughout the Nation. A right to equal treatment existing anywhere, exists everywhere in the Nation. A right to have public schools racially balanced, if such exists within the Equal Protection Clause, exists not only in one section of this country but throughout the entire land.

Justices Black and Douglas, dissenting in *South v.*

Peters, 339 U. S. 276, 279, 70 S. C. 641, 94 L. Ed. 834, stated: "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic form of government."

The conflict between the decisions of the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, on the one hand, and the decision of the Fifth Circuit, on the other, with reference to the necessity of racial balancing under the Equal Protection Clause, has created privileged groups of citizens in one section of this Nation, while denying the same privilege to the citizens of other sections of the Nation. Such discrimination, in the name of "equal protection" is the antithesis of equal protection and should be corrected by this Court.

One of the traditional functions of the Supreme Court is to resolve and accommodate diversities and conflicts occurring among the courts of the eleven federal circuits. *Charles Dowd Box Co. v. Courtney*, 368 U. S. 502, 82 S. Ct. 519 (1962), 7 L. Ed. 2d 483.

The resolution of such conflicts as a traditional function of the Court is embodied in Supreme Court Rule 19(b), which states in pertinent part:

> "Rule 19. Considerations Governing Review on Certiorari
>
> * * *
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ."

The following is a list of some of the more recent cases wherein the Supreme Court has granted certiorari to settle a conflict on the point at issue among the Circuit Courts of Appeals:

U. S. v. Union Cent. Life Ins. Co., 82 S. Ct. 349, 368 U. S. 291 (1961), 7 L. Ed. 2d 294 (Conflict on question of filing requirements for federal tax liens;

U. S. v. O'Malley, 383 U. S. 627, 86 S. Ct. 1123 (1966), 16 L. Ed. 2d 145 (Conflict on question of taxability of trust property);

U. S. v. Muniz, 374 U. S. 150, 83 S. Ct. 1850 (1963), 10 L. Ed. 2d 805 (Conflict in construction of Federal Tort Claims Act);

C. I. R. v. Lester, 366 U. S. 299, 81 S. Ct. 1343 (1961), 6 L. Ed. 2d 306 (Conflict on question of agreement in divorce action as affecting support payments of children);

Knetch v. U. S. 364, U. S. 361, 81 S. Ct. 132 (1960), 5 L. Ed. 2d 128 (Conflict on interest deductions under Internal Revenue Code);

Nicholas v. United States, 384 U. S. 678, 86 S. Ct. 1674 (1966), 16 L. Ed. 2d 853 (Conflict on question of liability of superseding trustee in bankruptcy for interest and penalties on federal taxes);

Sinclair Refining Co. v. Atkinson, 370 U. S. 195, 82 S. Ct. 1328 (1962), 8 L. Ed. 2d 440 (Conflict on labor law question under Taft-Hartley Act);

Perry v. Commerce Loan Co., 383 U. S. 392, 86 S. Ct. 852 (1966), 15 L. Ed. 2d 827 (Conflict

on question whether confirmation of wage-earner extension-of-time plan is barred by discharge in bankruptcy);

Maysonet Guzman v. Ruiz Pichirlo, 369 U. S. 698, 82 S. Ct. 1095 (1962), 8 L. Ed. 2d 205 (Conflict on question of liability of vessel for longshoreman's injuries);

Segal v. Rochelle, 382 U. S. 375, 86 S. Ct. 511 (1966), 15 L. Ed. 2d 428 (Conflict on question of bankruptcy administration).

The question of requiring racial balance in the case at bar, which is the subject of conflict between the Fifth Circuit and the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeal is of grave importance to this Nation and involves a matter which, at the very least, is of equal significance with any matter deemed worthy of consideration by this Court in order to resolve a conflict among the circuits.

III.

DOES A NON-DESEGREGATED FACULTY PER SE VIOLATE CONSTITUTIONAL RIGHTS OF STUDENTS OR IS SUCH A SITUATION ONE THAT REQUIRES PROOF OF THE DENIAL OF EQUAL PROTECTION?

The decree issued by the Court of Appeals apparently holds that as a matter of law a non-desegregated faculty denies equal protection of the laws to the plaintiffs and their class.[10] The Court arrived at this assumption without any evidence in the record to support or reject it. There is no doubt, since the Brown decision, that

[10]Jefferson II, pp. 18-21.

student classification based on race is per se unconstitutional; however, this Court has held in two prior cases that evidence must be taken on the question of teacher assignment.

> "The petitions for writs of certiorari to the Court of Appeals for the Fourth Circuit are granted for the purpose of deciding whether it is proper to approve school desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis. We hold that the Court of Appeals erred in both these cases in this regard, 345 F. 2d 310, 319-321; 345 F 2d 325, 328.
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> * * *
>
> We hold that petitioners were entitled to such full evidentiary hearings upon their contention. There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative." *Bradley v. School Board, City of Richmond, Va.*, 382 U. S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187.

> "From the outset of these proceedings petitioners have challenged an alleged policy of respondents of allocating faculty on a racial basis. The District Court took the view that petitioners were without standing to challenge the alleged policy, and accordingly refused to permit any inquiry into the matter. The Court of Appeals sustained this ruling, holding that only students presently in desegregated grades would have the standing to make that challenge. 345 F. 2d. 117, 125. We do not agree and remand for a prompt evidentiary hearing on this issue." *Rogers v. Paul*, 382 U. S. 198, 200; 86 S. Ct. 360, 15 L. Ed. 2d 265.

If this Court is to be consistent, it should vacate the decision of the Court of Appeals and remand the cases to the district court for the taking of evidence.

IV.

IF A NON-DESEGREGATED FACULTY IS CONSTITUTIONALLY IMPERMISSIBLE, DOES THE CONSTITUTION REQUIRE A RACIAL BALANCING OF THE FACULTY, WITH THE BURDEN OF ACCOMPLSHING THE SAME ON SCHOOL ADMINISTRATORS?

The decree contemplates that each school board must take into consideration the race of all teachers and assign them in such a manner that no school in the system has a faculty of one race.[11] In addition, the school authorities shall make assignments with the objective of achieving a racial balance among the faculty.[12]

Assignment on such a basis would constitute a mandatory racial classification of all teachers and staff personnel with employment, assignment and transfers being predicated on the racial classificatoin. Such a race conscious system certainly is not a minimal constitutional requirement. As a matter of fact, such a policy itself constitutes discrimination. *Hughes v. Superior Court*, 339 U. S. 460, S. Ct. 718 (1950), 94 L. Ed. 985.

Even the legislative body of government has determined that employment preference based on race is not an appropriate device.

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[11]Jefferson II, p. 9.
[12]Jefferson II, p. 19.

Civil Rights Act of 1964, Title VII:

"Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . ."

Classifications based on race are "odius to a free people", *Korematsa v. U.S., (1944)* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194.

V.

DOES NATIONAL POLICY AS ESTABLISHED BY BY CONGRESSIONAL ACTION REQUIRE OR SUPPORT THE DECISION IN THIS CASE?

Ordinarily, when determining constitutional requirements, discussion of national policy, congressional intention and administrative dictates would be irrelevant. Be that as it may, the decision of Jefferson I, by its very language, is inextricably woven into the Civil Rights Act of 1964[13] and the H. E. W. 1966 Guidelines.[14]

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the progress of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

Jefferson I, p. 7.

". . . and are intended by Congress and the executive to be part of a cooordinated national program."

Jefferson I, p. 8.

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[13]Pertinent provisions of Civil Rights Act of 1964 are contained in Exhibit G.

[14]H. E. W. 1966 Guidelines are contained in Exhibit I.

". . . Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. . . ."

Jefferson I, p. 9.

". . . We have taken a close look at the background and objectives of the Civil Rights Act of 1964."

Jefferson I, p. 10.

". . . The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled decision consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution.

Jefferson I, pp. 11-12.

". . . Titles IV and VI together constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregation the United States Office of Education and the Nation's purse."

Jefferson I, pp. 12-13.

". . . Congress speaks as the Voice of the Nation. The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems — with

or without federal funds."

Jefferson I, p. 14.

". . . The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established before the Guidelines were promulgated. Again we hold, "we attach great weight" to the Guidelines. *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1965, 348 F.2d 729 *(Singleton I)*. "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . ."

". . . We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education. . . ."

Jefferson I, p. 17.

". . . [T]he courts should endeavor to model their standards after those promulgated by the executive. . . ."

Jefferson I, p. 18.

". . . For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a dejure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and

in an orderly manner.

* * *

"We read Title VI as a congressional mandate for change — change in pace and method of enforcing desegregation. . . ."

Jefferson I, p. 19.

". . . When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy.

Jefferson I, p. 27.

"C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are."

Jefferson I, p. 29.

"The national importance of the HEW Guidelines the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil

Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools."

Jefferson I, p. 32.

"We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for foot-dragging."

Jefferson I, p. 35.

"F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation. It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964."

Jefferson I, p. 38.

Despite eloquent protestations to the contrary, neither the legislative history of the Civil Rights Act of 1964, the Act itself, nor subsequent congressional legislation supports the doctrine which requires affirmative elimination of racial imbalance.

Excerpts from the Congressional Record set forth in Exhibit F, which contain statements of the floor leader with reference to the interest of the act, are replete with statements which disallow any attempt to require anything more than elimination of assignment on basis of race.

The Act itself disclaims, in specific, unmistakable language any attempt to require elimination of racial imbalance.

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Civil Rights Act 1964, Title IV, Sec. 401(b).

". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial imbalance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial imbalance, or otherwise

enlarge the existing power of the court to insure compliance with constitutional standards. . . ."

Civil Rights Act 1964, Title IV, Sec. 407(a).

This congressional statement of policy is further stated and implemented in the Aid to Education Bills of 1965-1966.[15]

The Civil Rights Act of 1964 provided that the appropriate agency would have the right to cut off federal funds for any program operating in a non-desegregated manner.[16] The agency that is responsible for allocation of the funds for educational purposes is the Department of Health, Education and Welfare. The legislative history clearly shows that Title VI was to be read in the light of the definition of desegregation contained in Title IV of the Act.[17] To further eliminate the possibility of irresponsible administrative action Congress provided that any rules or regulations were to be approved by the President prior to it becoming effective.[18]

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[15]See pertinent excerpts in Aid to Education Acts, Exhibit H.

[16]Title VI of the Civil Rights Act of 1964.

[17]See Exhibit E.

[18]Civil Rights Act of 1964, Title VI, Section 602; See Exhibit G.

These rules when adopted were to be applied nationally and equally.[19]

How have the H.E.W. Guidelines, relied on extensively by the Court for its direction, complied with the requisites established by Congress? — Requirements of the 1966 Guidelines apply only to certain states in the Union. Quota systems to balance student bodies and faculties are not applied to situations where so called "de facto" segregation exist. The Guidelines have never been approved by the President even though, pursuant to said Guidelines, payment of funds has been suspended. The Guidelines are administered without regard to the admonition in the act with regard to racial balancing.[20]

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[19]Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964).
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> * * *
>
> "MR. PASTORE . . . We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964).

[20]See deposition of Director in charge of Louisiana, Exhibit J.

The affect of these H.E.W. Guidelines is to place the administration of each school system on a "Procrustean Couch" tailoring it to, not constitutional limits, but administrative dictates.

VI.

CAN RULES ESTABLISHED BY CONGRESS OR BY ADMINISTRATIVE FIAT, FOR THE PURPOSE OF QUALIFYING FOR FEDERAL FUNDS, BECOME BASIC MINIMAL CONSTITUTIONAL STANDARDS?

The opinion in Jefferson I placed great stress on the idea that there should be little difference between the H.E.W. Guidelines of 1966 and the constitutional minimum standards. Discussion of the difference between the right to establish rules to withhold funds and that of regulation of a practice is obvious only by its absence.[21] This distinction was well recognized and discussed by Senator Humphrey.

> "Title VI is also not an interference in any sense with private business and individual rights. It does not confer any new Federal authority; it merely states how the authority conferred by other laws is to be administered. It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.'"

110 Cong. Rec. Vol. 5, p. 6546.

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[21]This failure is more pointed when it is realized that not all of the school boards involved accepted federal educational funds (City of Monroe).

Judge Bell in his dissent recognized the difference when he stated:

> The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion.
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> Jefferson II, p. 66.

The adoption of fund requirements[22] as minimal standards is novel in the annals of law.

> "In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and

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[22]It should be noted that the Court of Appeals held H.E.W. Guidelines to be valid and within the scope of the Civil Rights Act despite the fact that the issue was not before the Court.

meet the requirements of the United States Constitution."

Jefferson II, p. 7.

Affirmation of any such doctrine, considering the hundreds of areas where funds are granted pursuant to administrative rule, would in effect turn over legislative and judicial fuctions to the whims of administrative agencies.

The Courts, and not an administrative agency, such as HEW, should interpret the Constitution and determine questions of constitutional law.

> "Most emphatically, the courts are generally the experts, as compared with agencies, on many types of issues, and this fact alone is freqeuntly a sufficient reason for substitution of judicial for administrative judgment on problems of applying legal concepts to established facts. The courts, not the agencies, are comparatively the experts in many areas, including constiutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the particular field of the agency."

Davis, Administrative Law Treatise, Volume 4, Sec. 30.09 (main volume), Sec. 30.06 (supplement); see also Davis, Administrative Law, (1965 edition) p. 390 (West Publishing Co.); Parker Administrative Law (Bobbs-Merrill 1952) pp. 265-266; Vom Baur, Federal Administrative Law, Vol. 1, Sec. 449 (Callaghan 1942).

The determination of constitutional questions represents the highest exercise of Judicial power:

> "It has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions." *Panity v. District of Col.* 112 F. 2d 39, 42,

The rule-making power of an administrative agency, such as HEW, being subject to the limitations of the federal constitution, cannot extend to the interpretation or modification of the federal constitution. *Anti Fascist Committee v. McGrath*, 341 U. S. 123; *D. C. v. Little*, 178 F. 2d 13, aff'd 339 U.S. 1; *Crowell v. Benson*, 285 U. S. 22, 60; 1 Am. Jur. 2d Admin. Law Secs. 72, 132, 133; Parker, Administrative Law, pp. 152, 167 (Bobbs-Merrill 1952); Vom Baur, Federal Administrative Law, Vol. 1, Sec. 77 (Callaghan 1942).

VII.

DOES THE DECREE ISSUED BY THE FIFTH CIRCUIT VIOLATE THE EXPRESS MANDATE ISSUED BY THIS COURT, REQUIRING THE DISTRICT COURT TO FASHION THE REMEDY IN EACH CASE ACCORDING TO THE CIRCUMSTANCES AND CONDITIONS PREVAILING?

This Court in establishing the desegregation doctrine in Brown recognized that conditions would vary extensively from state to state and within the states themselves. Accordingly, it permitted the district judge to determine whether the plan submitted by the school board was sufficient to accomplish desegregation within the system involved.

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for

elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Topeka*, 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083.

The uniform decree issued by the Fifth Circuit in this case completely subverts the doctrine of flexibility and requires each district court to issue a uniform, stero-type decree. The rigid and flexible decree encompasses in it many provisions which might better be left to the discretion of the court and many requirements which appear to have no basis for application as minimal constitutional standards.

There appears to be no constitutional reason why each student should have to make an annual choice,[23] why the choice should have to be made in a specific on month period,[24] why each student or parent should not be required to make a choice,[25] or why a student in the Ninth grade or over fifteen years of age is in a position to

[23]Jefferson II, Decree II(b), p. 9.
[24]Jefferson II, Decree II(c), p. 9.
[25]Jefferson II, Decree II(d), p. 9.

choose without the necessity of parental consent.[26] The necessity for the letter and choice forms to be mailed by first class mail rather than delivered by some equally effective manner and the necessity that the same be in the language chosen by the court seems to be equally unnecessary.[27]

Why should a child be denied continually a preference for school previously attended and granted a preference solely on geographic distance when same may result in yearly involuntary school re-assignment?[28] Does the constitution require that the court route buses,[29] determine which schools should be closed,[30] decide who should be afforded remedial educational programs,[31] and where school buildings should be located?[32] Certainly these mandatory requirements, in addition to others, unnecessarily constrict discretion of the district courts.

VIII.

DOES THE BROWN DECREE ALLOWING THE COURT TO RETAIN JURISDICTION PERMIT THE FEDERAL COURTS TO EXPERIMENT WITH SCHOOL SYSTEMS UNDER ITS DECREES, OR IS THE RETENTION OF SAID JURISDICTION LIMITED TO APPROVNG A METHOD OF DESEGREGATION?

The decision of Brown proportedly granted to the district court the duty of passing on plans for desegregation. The opinion and degree issued herein have opened "Pandora's Box" by permitting the court the

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[26]Jefferson II, Decree II(a), p. 8.
[27]Jefferson II, Decree II(e) & (f), p. 9.
[28]Jefferson II, Decree II(l), p. 12.
[29]Jefferson II, Decree II(n), p. 13.
[30]Jefferson II, Decree VI(a), p. 17.
[31]Jefferson II, Decree VI(b), p. 17.
[32]Jefferson II, Decree VII, p. 18.

right to tell the school board not what is constitutionally permissible, but what is good, better or best. School attendance not based on color can be achieved without the necessity of an "Educational Park", "Princeton Plan" or other device recommended by experimental planners. Absent discrimination on the basis of race, the operation of the school system must constitutionally and practically be left in the hands of local school officials. Neither the court nor the federal administrative agencies are in a position to efficiently and effectively operate the schools. Uniformity, and compulsory adherence to experimental education are within the discretion of local officials to adopt, but must not and cannot be a constitutional requirement.

CONCLUSION

The opinion and decree of the court below requiring assignment by race and racial balancing of both faculty and students is contrary to the jurisprudence of this Court and of numerous circuits within this country. The results of this doctrine is to "force feed" a certain section of the country with a diet, unpalatable and unprescribed for the balance of the nation. Constitutional principles must be applied on a national basis. Punitive sectionalism cannot endure. The purpose of permitting the courts to devise plans under the Brown decision was to grant time to adjust school systems to a new decision regarding rights, but was not an invitation to conduct social innovation. Unless the decision of the majority is overruled, the school districts in this circuit

will be relegated to a test tube in the laboratory of admininstrative social experimentation.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General
State of Louisiana

WILLIAM P. SCHULER
Second Assistant
Attorney General

JOHN A. RICHARDSON
District Attorney
First Judicial District
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Second Judicial District
Homer, Louisiana

ALBIN B. LASSITER
District Attorney
Fourth Judicial District
Monroe, Louisiana

LOUIS H. PADGETT, JR.
District Attorney
Twenty-Second Judicial District
Bossier City, Louisiana

CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals has been served on all opposing counsel of record in accordance with law and the rules of the United States Supreme Court by depositing the same in the United States mail with first class postage prepaid, addressed to each counsel of record at his post office address.

New Orleans, Louisiana, this _____day of _____, 1967.

_____

WILLIAM P. SCHULER

PLEASE SERVE:

VIA AIR MAIL
Hon. John Doar
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

VIA AIR MAIL
Hon. David L. Norman
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

VIA AIR MAIL
Mr. Norman Amaker
10 Columbus Circle
New York, New York

Mr. Alvin J. Bronstein
603 N. Farish Street
Jackson, Mississippi

Mr. Richard B. Sobol
2209 Dryades Street
New Orleans, Louisiana

Mr. A. P. Tureaud
1821 Orleans Avenue
New Orleans, Louisiana

EXHIBIT "A"

ORDER ON PLAN FOR DESEGREGATION

Respondent, Caddo Parish School Board, pursuant to this Court's order of June 14, 1965, has presented to the Court a proposed plan for desegregation of the Caddo Parish school system. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondents, and the objections thereto presented by plaintiffs, and after having taken into consideration the local problems inherent in any attempt to desegregate the public schools in Caddo Parish, as well as prior pronouncements of the United States Supreme Court, and of the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

It is ordered that the following plan for the orderly desegregation and control of the Caddo Parish School Board be, and it is hereby approved and adopted:

1. All initial pupil assignments made for the school year 1965-66 will be considered adequate, subject however to the following transfer provisions:

   (a) The Caddo Parish School Board will, not later than August 5, 1965, cause to be published in The Shreveport Times for three (3) consecutive days, a notice to persons responsible for pupils eligible to enter the first and twelfth grades, advising said persons that applications

for assignment to the first and twelfth grades of any school under its jurisdiction may be made in person at the Caddo Parish School Board Office from *August 9*, 1965, to *August 13*, 1965.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Caddo Parish School Board.

(c) Application form for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with

the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or

former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than *August 26*, 1965. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification of rejection.

2. Commencing with the school year 1966-1967 all initial assignments of pupils to the first, second, eleventh and twelfth grades in all schools under the supervision and control of the Caddo Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. In each succeeding school year this planned desegregation shall progress to that all grades shall be included by September 1968. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

4. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Caddo Parish School Board.

5. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

6. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this *3rd* day of August, 1965, at Shreveport, Louisiana.

(S) Ben C. Dawkins, Jr.
CHIEF JUDGE

AMENDED ORDER ON PLAN FOR DESEGREGATION

Considering the Motion to Vacate and prayer for reconsideration made by plaintiffs herein, in light of the ruling entered by the United States Court of Appeals for the Fifth Circuit on August 17th, 1965, in the matter entitled *United States of America v. Bossier Parish School Board, et al.*, ____ F. 2d ____, No. 22863 on the docket of that Court; and,

Having given full reconsideration to this matter in the light of that ruling and to all other matters presented herein;

It is now hereby ORDERED AND DECREED:

1. That the Caddo Parish School Board, beginning Fall 1965, shall desegregate Grades Two and Eleven, in addition to Grades One and Twelve, as heretofore ordered; that beginning Fall 1966 said School Board shall desegregate Grades Three, Four, Nine and Ten; and beginning Fall 1967 said School Board shall desegregate Grades Five, Six, Seven and Eight, thus completing the entire desegregation process by Fall 1967;

2. That, in keeping herewith, said School Board shall advertise in *The Shreveport Times* on August 20, 21 and 22, 1965, that beginning on August 23rd, and continuing through 5:00 P. M. on August 25th, all students, regardless of race or color, presently assigned for the school year 1965-66 to the Second and Eleventh Grades of any school under its jurisdiction, may apply in person, at the School Board Office, accompanied by parents or guardian, for

transfer and reassignment to the Second or Eleventh Grade of another school of their choice;

3. That said School Board shall notify any such applicants of its action of accepting or rejecting such applications on August 27th, 1965;

4. That, otherwise, all of the terms and conditions of the original order of August 3rd, 1965, are hereby reinstated and shall remain in full force and effect.

5. This Amended Order confirms the verbal order entered on August 19th, 1965.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this 20th day of August, 1965, *nunc pro tunc* to August 19th, 1965.

(S) Ben C. Dawkins, Jr.
CHIEF JUDGE

Filed: August 20, 1965

EXHIBIT "B"

ORDER ON PLAN FOR DESEGREGATION

Respondent, Bossier Parish School Board, pursuant to this Court's order of April 13, 1965, has presented to the Court a proposed plan for desegregation of the Bossier Parish School system. The plaintiffs and intervenor have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondents, and the objections thereto presented by plaintiffs and intervenor, and after having taken into consideration the local problems inherent in any attempt to desegregate the public schools in Bossier Parish, as well as prior pronouncements of the United States Supreme Court, and of the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Bossier Parish School Board be, and it is hereby approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

(a) The Bossier Parish School Board will not later than *August 2*, 1965, mail notices to all students, regardless of race or color, presently assigned for the school year 1965-1966, to the twelfth grade of any school under its jurisdiction, advising them that they may, from *August 9*,

1965, to *August 13, 1965*, apply in person, accompanied by parents or guardian, for transfer and reassignment to the twelfth grade of another school of their choice.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Bossier Parish School Board.

(c) The Bossier Parish School Board will, not later than *August 2*, 1965, cause to be published in The Shreveport Times for three (3) consecutive days, a notice to persons responsible for pupils eligible to enter the first grade, advising said persons that applications for assignment to the first grade of any school under its jurisdiction may be made in person at the Bossier Parish School Board Office from *August 16*, 1965, to *August 20*, 1965.

(d) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(e) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to

be applied in granting or denying the request for transfer or assignment.

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(f) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than *August 27*, 1965. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification of rejection.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the first, second, eleventh and twelfth grades in all schools under the supervision and control of the Bossier Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school

other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. In each succeeding school year this planned desegregation shall progress so that all grades shall be included by September 1968. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

4. The method of intial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Bossier Parish School Board.

5. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

6. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly

administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this *28th* day of *July*, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

AMENDED ORDER ON PLAN FOR DESEGREGATION

This Court having been ordered, by the United States Court of Appeals for the Fifth Circuit, on August 17th, 1965, to reconsider its original "Order on Plan for Desegregation," entered herein on July 28th, 1965, in the light of *Singleton v. Jackson Municip l Separate School District, et al*, _____ F. 2d _____, No. 22527, decided by that Court on June 22nd, 1965, and *Price v. Denison Independent School District Board of Education*, _____ F. 2d _____, No. 21672, decided by that Court on July 2, 1965; and,

Having followed such order and having given full reconsideration to this matter in its entirety:

It is now hereby ORDERED AND DECREED:

1. That the Bossier Parish School Board, beginning

Fall 1965, shall desegregate Grades Two and Eleven, in addition to Grades One and Twelve, as heretofore ordered; that beginning Fall 1966 said Board shall desegregate Grades Three, Four, Nine and Ten; and beginning Fall 1967 said School Board shall desegregate Grades Five, Six, Seven and Eight, thus completing the entire desegregation process by Fall 1967;

2. That, in keeping herewith, said School Board shall advertise in *The Shreveport Times* on August 20, 21, and 22, 1965, that beginning on August 23rd, and continuing through 5:00 P.M. on August 25th, all students, regardless of race or color, presently assigned for the school year 1965-66 to the Second and Eleventh Grades of any school under its jurisdiction, may apply in person, at the School Board Office, accompanied by parents or guardian, for transfer and reassignment to the Second or Eleventh Grade of another school of their choice;

3. That said School Board shall notify any such applicants of its action of accepting or rejecting such applications on August 27th, 1965;

4. That, otherwise, all of the terms and conditions of the original order of July 28th, 1965, are hereby reinstated and shall remain in full force and effect.

5. This Amended Order confirms the verbal order entered on August 19th, 1965.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, on this 20th day of August, 1965, *nunc pro tunc* to August 19th, 1965.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "C"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: October 11, 1965)

Respondent, Claiborne Parish School Board, pursuant to this Court's Order of August 27, 1965, has presented to the Court a proposed plan for desegregation of the Claiborne Parish School System. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in Claiborne Parish, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Claiborne Parish School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Claiborne Parish School Board will, not later than January 1, 1966, mail notices to all students, regardless of race or color,

presently assigned for the school year 1965-1966 to the First, Eighth, Ninth, and Twelfth grades of any school under its jurisdiction, advising them that they may, within five days thereafter, apply in person, accompanied by parents or guardian, for transfer and reassignment to another school of their choice, effective mid-term January 1966.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Claiborne Parish School Board.

(c) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Claiborne Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

To accomplish this, the Claiborne Parish School

Board shall, not later than May 1, 1966, mail notices to all students, regardless of race or color, who can be expected to enroll for the school year 1966-67 in the First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth grades of all schools under its jurisdiction, advising them that they may, within five days from the mailing date of such notices, apply in person, accompanied by parents or guardian, for transfer and reassignment to the school of their choice, subject to the rules and procedures above set forth.

3. Commencing with the school year 1967-68, all initial assignments of pupils to all grades in all schools under the supervision and control of the Claiborne Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein pro-

vided for will, of course, be subject to all reasonable procedural acquirements that may be adopted and promulgated by the Claiborne Parish School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this 11th day of October, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "D"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: October 5, 1965)

Respondent, Jackson Parish School Board, pursuant to this Court's Order of July 27, 1965, has presented to the Court a proposed plan for desegregation of the Jackson Parish School System. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in Jackson Parish, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Jackson Parish School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Jackson Parish School Board will, not later than December 1, 1965, mail notices to

all students, regardless of race or color, presently assigned for the school year 1965-1966 to the First, Second, Eleventh and Twelfth grades of any school under its jurisdiction, advising them that they may, from January 3, 1966, to January 7, 1966, apply in person, accompanied by parents or guardian, for transfer and reassignment to another school of their choice.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Jackson Parish School Board.

(c). Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the the applicant or his parents or guardian in the preparation of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-67 all initial assignments of pupils to the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Jackson Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

3. Commencing with the school year 1967-68, all initial assignments of pupils to all grades in all schools under the supervision and control of the Jackson Parish School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Jackson Parish School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the re-

mainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees and, all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "E"

ORDER ON PLAN FOR DESEGREGATION

(Number and title omitted) (Filed: November 2, 1965)

Respondent, Monroe City School Board, pursuant to this Court's Order of September 17th, 1965, has presented to the Court a proposed plan for desegregation of the Monroe City School system. The plaintiffs have presented their objections thereto.

Now, after due consideration of the proposed plan submitted by respondent and the objections thereto presented by plaintiffs, and after taking into consideration the local problems inherent in any attempt to desegregate the public schools in the City of Monroe, as well as prior pronouncements of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit, by which pronouncements this Court is bound:

IT IS ORDERED that the following plan for the orderly desegregation of the schools under the supervision and control of the Monroe City School Board be, and it is hereby, approved and adopted:

1. All initial pupil assignments made for the school year 1965-1966 will be considered adequate, subject however to the following transfer provisions:

   (a) The Monroe City School Board will, not later than January 1, 1966, mail notices to all students, regardless of race or color, pres-

ently assigned for the school year 1965-1966 to the First, Second, Eleventh and Twelfth grades of any school under its jurisdiction, advising them that they may, within five days thereafter, apply in person, accompanied by parents or guardian for transfer and reassignment to another school of their choice, effective mid-term January 1966.

(b) Such transfers will be made in accordance with the procedures pertaining to transfers currently in general use by the Monroe City School Board.

(c) Application forms for transfers or assignments will be made available, upon request, by the School Board to all students and parents affected, and complete, detailed instructions as to procedures will be furnished with the applications.

(d) Transfers or assignments, when requested, shall not be unreasonably denied. No denial of a request for transfer or assignment shall be based on race or color. However, in determining whether or not a request for transfer or assignment shall be granted, the School Board, in considering the application for transfer or assignment, may consider the following factors as proper criteria to be applied in granting or denying the request for transfer or assignment:

(1) The desire or wishes of the pupil and his parents or guardian.

(2) Availability of space and other facilities in the school to which the transfer or assignment is requested.

(3) The age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested.

(4) The availability of requested or desired courses of study in the school to which the transfer is requested.

(5) In the event a transfer or assignment is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the transfer or assignment to the comparable school closest to the pupil's residence, rather than to the school to which the transfer or assignment was requested.

(6) No pupil will be granted more than one transfer in any one school year, except under special circumstances found justifiable by the School Board.

(7) No request for transfer or assignment may be denied solely on the grounds of technical errors or omissions made by the applicant or his parents or guardian in the prep-

aration of the application for transfer or assignment.

(8) Any new students, entering the school system for the first time, regardless of grade, shall be entitled to assignment according to their choice to the former all white school or former all Negro school closest to their place of residence.

(e) All pupils requesting transfer or assignment in accordance herewith shall be notified in writing by the School Board of action taken on their requests for transfer or assignment not later than January 14, 1966, to be effective at mid-term, 1966. If such notification is to the effect that the requested transfer or assignment has been denied, specific reasons for such denial shall be clearly set forth in the notification.

2. Commencing with the school year 1966-1967 all initial assignments of pupils to the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades in all schools under the supervision and control of the Monroe City School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives the right to place a pupil in a comparable school other than the school of his choice should there be a comparable

school closer to the pupil's residence than is the school of his choice.

To accomplish this, the Monroe City School shall, not later than May 1, 1966, mail notices to all students, regardless of race or color, who can be expected to enroll for the school year 1966-1967 in the First, Second, Third, Fourth, Ninth, Tenth, Eleventh, and Twelfth grades of all schools under its jurisdiction, advising them that they may, within five days from the mailing date of such notices, apply in person, accompanied by parents or guardian, for transfer and reassignment to the school of their choice, subject to the rules and procedures above set forth.

3. Commencing with the school year 1967-1968, all initial assignments of pupils to all grades in all schools under the supervision and control of the Monroe City School Board shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board through its authorized representatives, the right to place a pupil in a comparable school other than the school of his choice should there be a comparable school closer to the pupil's residence than is the school of his choice.

4. Dual school districts on racial lines shall be abolished contemporaneously with the application

of this plan to the respective grades when and as reached by the application of this plan.

5. The method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the Monroe City School Board.

6. Nothing contained in this order shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

7. If any paragraph of these rules and procedures shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of such rules and procedures shall continue in full force and effect.

IT IS FURTHER ORDERED that respondents herein, and their successors in office, their agents, servants, representatives, or employees, and all other persons whomsoever acting in concert with any and all of such persons, are hereby permanently enjoined from doing anything calculated to obstruct or interfere with the orderly administration of this plan for effecting the transition of the schools hereinabove mentioned to a racially non-discriminatory basis.

Jurisdiction of this matter is retained for the entry of any further orders hereafter deemed necessary in the premises.

SIGNED this 2nd day of November, 1965, at Shreveport, Louisiana.

/s/ Ben C. Dawkins, Jr.

CHIEF JUDGE

Exhibit "F"

Selected Portions of Statements by Floor Leader, Senator Hubert Humphrey.

110 Congressional Record, Vol. 5, page 6546.

Title VI is also not an interference in any sense with private business and individual rights. It does not confer any new Federal authority; it merely states how the authority conferred by other laws is to be administered. It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to "fix the terms on which Federal funds shall be disbursed." *Okalhoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered.

110 Congressional Record, Vol. 5, page 6545.

This does not mean that title VI would authorize a Federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers, and authority to achieve compliance with that requirement by cutoff of funds or by other means authorized by law.

110 Congressional Record, Vol. 10, pages 12713 thru 12717.

TITLE IV

Title IV, dealing with public school desegregation, is amended and clarified in several respects in our substitute.

One amendment would provide that before the Attorney General can institute suit he must believe that the complaint, filed with him by an individual concerning a denial of equal protection, is meritorious. A further change would provide that any such complaint must be in writing.

Another amendment provides that prior to instituting suit, the Attorney General must give notice to the appropriate school authorities, and must certify that he is satisfied that these authorities have had a reasonable time in which to adjust the conditions alleged in such complaint. This is intended to recognize and preserve the importance of voluntary action by local authorities.

Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged racial imbalance in public schools. The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation, and, indeed, said as much in section 401(b). However, to make this doubly clear, two amendments dealing with this matter are proposed.

The first provides that nothing in title IV "shall empower any court" or official of the United States to issue "any order" seeking to achieve "a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school

district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." This addition seeks simply to preclude an inference that the title confers new authority to deal with "racial imbalance" in schools, and should serve to soothe fears that title IV might be head to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.

Furthermore, a new section 410 would explicitly declare that "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.

Another amendment, by some appropriate changes in the wording of section 401(c) which defines "public school," corrects a technical deficiency of language, and makes clear that the power to sue, as granted the Attorney General by title IV, is limited to bringing suits to desegregate public or publicly supported schools, not private schools. Of course, it was never intended to reach private schools, which are not prohibited by the

14th amendment from discrimination. The amendment would make this explicit.

Other minor changes include deleting the concept of the "public policy of the United States favoring" the orderly achievement of school desegregation, for the same reason the phrase would be deleted in title III; and a revision, identical to that made in title III, of the guidelines for the Attorney General concerning when in his judgment he may deem persons unable to initiate and maintain appropriate legal proceedings for relief. And, as in title III, the criminal sanctions of the false writing and document statute, 18 U.S.C. 1001, are made applicable to complaints filed with the Attorney General.

TITLE V

The major change in title V sets out in greater detail the procedures the Civil Rights Commission must follow, particularly with respect to its hearings. While the Commission already follows many of these procedures, the purpose of these amendments is to write these procedural safeguards into the Commission's basic charter. These specific procedural requirements are designed to afford additional protection to witnesses appearing before the Commission. While the bill would retain the present provision that a witness before the Commission may be accompanied and advised by counsel, it would extend the protection by providing that counsel may examine his client, object on the record, and argue briefly in support of the objection.

The amended version would also extend the protection afforded persons who may be defamed or incriminated by

testimony given at a Commission hearing. As in the House version of the bill, if the Commission thinks any testimony may tend to defame or incriminate, it is required to receive the testimony in executive session. The amendment would further provide that before the Commission may decide to use such evidence it must afford the person affected by the testimony the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses. Furthermore, if the Commission decides to release the defaming testimony, this material must first be presented at a public session and the defamed individual shall be allowed to appear at this session and to file statements in his behalf.

The Commission will also be required first, to publish in the Federal Register notice of any hearings it intends to hold, including the time, place, and subject matter of the hearing; second, to give a copy of its rules to prospective witnesses; and third, to make transcripts of all its hearings. Witnesses will be entitled to purchase or inspect transcripts of testimony and the general public also may purchase transcripts of public sessions of the Commission. The Commission will also have to publish in the Federal Register its organizational structure, its methods of operation, and its rules.

The Commission will be restricted to the rules, organizations, and procedure as published. And, by amendments to section 506, it will be required that first, hearings may be held only by the Commission or by a subcommittee thereof composed of members of both political parties; second, subpenas may be issued only in accordance with the rules specified in the act; third, the holding of hearings must be approved by a majority of the members

present at a meeting at which at least a quorum of four members are present; and fourth, that the courts may require the production before the Commission only of evidence which is "pertinent, relevant, and nonprivileged."

The other principal change in title V amends section 504, which lists the Commission's duties. This amendment makes it clear that the functions of the Commission are not to be expanded beyond matters constituting "denials of" the equal protection of the laws "because of race, color, religion, or national origin or in the administration of justice." This change does not alter to any significant extent the function of the Commission since it has in the past largely confined itself to this phase of denials of equal protection. The change is designed merely to conform the statutory powers of the Commission to the areas in which it has in the past operated and in which it contemplates operations. Basically, as the amendment indicated, these are denials of equal protection because of race, color, religion, or national origin, and denials of equal protection in the administration of justice, whether or not related to race, color, religion, or national origin.

I believe the revisions of title V have been very helpful, and I hope that Senators will study those revisions most carefully.

TITLE VI

We have made no changes of substance in title VI, which is concerned with discrimination in programs that receive financial assistance from the Federal Government. We have made several minor adjustments and, in addition,

we have modified the language to make explicit the declared intention of this title.

Section 601 would be amended by striking the introductory phrase, "Notwithstanding any inconsistent provision of any other law." No substantive alteration is intended by this deletion and there is no intention to revitalize or otherwise preserve the provisions of any other statute which would authorize discrimination in Federal programs or preclude action in accordance with the provisions of this title to prevent such discrimination. And, of course, in accordance with the many prior explanations given here and on the floor of the House, title VI would still have no effect on already existing executive authority in areas beyond the scope of the title.

Some Senators have expressed the fear that in its original form title VI would authorize cutting off of all Federal funds going to a State for a particular program even though only one part of the State were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize canceling all Federal assistance to a State if it were discriminating in any of the federally assisted programs in that State.

As was explained a number of times on the floor of the Senate, these interpretations of title VI are inaccurate. The title is designed to limit any termination of Federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of Federal assistance will be

restricted to the particular political subdivision which is violating nondiscrimination regulatons established under title VI. It further provides that the termination shall affect only the particular program, or part thereof, in which such a violation is taking place.

It is understood, of course, that a Federal agency would take such action as was necessary to effectuate a limited cutoff if a State agency attempted to continue payments to an offending local agency.

I might add that the discussions on the floor of the Senate, particularly by the Senator from Vermont [Mr. Aiken], the Senator from Tennessee [Mr. Gore], the Senator from Rhode Island [Mr. Pastore], the Senator from Connecticut [Mr. Ribicoff], and the Senator from West Virginia [Mr. Byrd], were taken into consideration in the revision or preparation of the amendments to title VI.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield to the Senator from West Virginia.

Mr. BYRD of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?

Mr. HUMPHREY. I do.

Mr. BYRD of West Virginia. Will the Senator from Minnesota cite the language in title VI which would give the Senator from West Virginia such assurance?

Mr. HUMPHREY. That language is to be found in another title of the bill, in addition to the assurances to be gained from a careful reading of title VI itself.

Mr. BYRD of West Virginia. In title IV?

Mr. HUMPHREY. In title IV of the bill.

Mr. BYRD of West Virginia. Will the Senator from Minnesota read that language in title IV?

Mr. HUMPHREY. Yes; I would be more than happy to do so.

The provision merely quotes the substance of a recent court decision, which I have with me, and which I desire to include in the Record today, the so-called Gary case. The language appears on page 21 of the substitute bill beginning on line 18. It refers back to matters of desegregation. The language is as follows:

Provided, That nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Mr. BYRD of West Virginia. What does the word "herein" mean?

Mr. HUMPHREY. It means within the act.

Mr. BYRD of West Virginia. Does it mean the act or the title?

Mr. HUMPHREY. It means the act. If the Senator would like to offer an amendment, if he believes we have not been sufficiently precise, I wish he would do so. As Senator in charge of the bill, I would entertain such an amendment.

Mr. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance" would preclude the Office of Education, under section 602 or title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?

Mr. HUMPHREY. Yes. I do not believe in duplicity. I believe that if we include the language in title IV, it must apply throughout the act. However, the courts would hold that if there were gerrymandering of school districts to provide for segregation, the order of the court to declare such gerrymandering unconstitutional would prevail. That is what we call the de facto school segregation problem.

Mr. BYRD of West Virginia, Yes.

Mr. HUMPHREY, As the law in the Federal court now stands, while intentional gerrymandering of school districts to perpetuate segregation has been held to be a violation of the 14th amendment, normal residential zoning resulting in de facto school desegregation will apparently be upheld by the courts. As to racial balancing, Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute. There was quite an argument about it among those of us who tried to prepare the substitute, but the Senators may recall that the Supreme Court refused to grant certiorari in this case. In effect, the ruling of the circuit court has been upheld.

Mr. BYRD of West Virginia. That may be true, but I must give my most careful attention to the proposal which may be enacted by the Congress. I merely wish to make doubly sure that the language is not unclear on the point, and I do not state at this time that I am opposed to the busing of children or that I support the busing of children. There is a great question in the minds of many Senators—and there is a question in my own mind—as to whether the subject, as treated herein, is completely unambiguous.

I agree that the language in title IV should make the point clear, insofar as title IV is concerned. I agree that no court, on the basis of this provision, would be empowered to issue any order seeking to achieve a racial balance in any school. But it does not mean that any agency in the Government could not cut off Federal

assistance. The issuance of a court order and the termination of Federal assistance are two different matters. Title VI in section 601 provides:

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 is for the purpose of implementing the policy laid down in section 601.

Mr. HUMPHREY. Correct.

Mr. BYRD of West Virginia. But in order to implement that policy it is provided in H.R. 7152 that each Federal department and agency, and this includes the Office of Education, which is empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guarantee, shall take action.

I believe that in the substitute bill the language "is authorized and directed," is used, which means "shall take action," with respect to such program or activity, to effectuate the policy that is enunciated in section 601.

It provides further:

Such action may be taken or pursuant to rule, regulation, or order—

These words may have been changed in the substitute, which I do not have before me—

It provides further:

After a hearing, compliance with any requirement—

I repeat "any requirement." "Any requirement" means "any requirement"—

Suppose the Office of Education establishes a regulation that there shall be no racial imbalance in the schools of any district which receives Federal assistance. Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school district wherein racial imbalance exists?

Mr. HUMPHREY. Let me read from the substitute:

Provided, That nothing herein shall empower any official or court of the United States to issue any order.

Mr. BYRD of West Virginia. "To issue any order," but does it provide that the Office of Education shall not cut off Federal assistance?

Mr. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read section 602.

Mr. BYRD of West Virginia. The words are:

No such rule, regulation, or order shall become effective unless and until approved by the President.

Mr. HUMPHREY. That is correct.

Mr. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

Mr. HUMPHREY. Because I do not believe the President will violate the law.

Mr. BYRD of West Virginia, The Senator says "I do not believe."

Mr. HUMPHREY. I cannot go to the White House and take a blood oath from him, but the President can read—

Mr. BYRD of West Virginia. The President would not be violating the law if such a requirement were established with his approval.

Mr. HUMPHREY. It is already provided in the proposed substitute that—

Nothing herein shall empower any official or court of the United States to issue any order,

Mr. BYRD of West Virginia. That is correct, but that is in title IV.

Mr. HUMPHREY. But it applies to the act.

Mr. BYRD of West Virginia. It may so apply.

Mr. HUMPHREY. If the Senator wishes to offer an amendment to clarify it, he may do so. I said I would be more than happy, as manager of the bill, to accept such an amendment. He has made his point. He should not convince me to the contrary.

Mr. BYRD of West Virginia. I am not convinced that the words "any requirement" cannot be utilized by the Office of Education, if it so desires, to achieve an objec-

tive of racial balance in the schools. That provision does not require that a court issue an order. It merely provides that, at the stroke of a pen, some bureaucrat in the Office of Education may cut off Federal assistance to a particular school district which does not act to comply with "any requirement" to correct racial imbalance.

Mr. HUMPHREY. I want to set the troubled mind of the distinguished Senator at rest. What we have done is to take into consideration the concern of the distinguished and able Senator from West Virginia. We remember his discussion on the floor. Under title IV and under title VI I have already indicated to the Senator that the word "herein" applies to the act—

Mr. BYRD of West Virginia. The Senator from Minnesota has said that.

Mr. HUMPHREY. But I am manager of the bill, and, as a part of the legislative history, that would have some importance. It would not be important because those words came from Senator Humphrey, but it would be important because the Senator from Minnesota is manager of the bill. I shall be glad to accept an amendment to clarify that point to make it more precise. One cannot get anything more definite than that.

Mr. BYRD of West Virginia. The Senator refers to legislative history.

Mr. HUMPHREY: Yes.

Mr. BYRD of West Virginia. He did that in the conference.

Mr. HUMPHREY: We will not worry about legislative history. We will accept the amendment. Where the language reads "herein," we will amend it to mean "herein in this act."

Mr. BYRD of West Virginia. I do not think that is sufficient. I think the Senator will agree with me that if we wanted to make it entirely unambiguous, we would have to write language more specifically to the point into title VI.

Mr. HUMPHREY. If the Senator will read all of title VI—

Mr. BYRD of West Virginia. I have, not once, but many times.

Mr. HUMPHREY. The worry is that some bureaucrat may issue an order that would cut off funds to a department or instrumentality or agency of a State or local government or school or some such activity or institution. What did we do to make sure that would not happen? We provided the language:

No such rule, regulation, or order shall become effective unless and until approved by the President.

Then comes this language:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity

for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate—

Like the Appropriations Committee of which the distinguished Senator from West Virginia is a member—having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Mr. BYRD of West Virginia. The Appropriations Committee does not have legislative jurisdiction.

Mr, HUMPHREY. It reads "having legislative jurisdiction over the program or activity involved."

The Appropriations Committee has the power of the purse.

Mr. BYRD of West Virginia. That is not legislative jurisdiction. The language reads: "legislative jurisdiction."

Mr. HUMPHREY. That is correct. I say most respectfully that the Appropriations Committee has a way of being able to get into practically every committee activity, because it has the power of the purpose.

I cannot believe the Senator's worries are well grounded. We are willing to listen to the Senator's arguments or his amendment, for I think he would probably secure great support.

Mr. BYRD of West Virginia. Mr. President, it is not my purpose to harass the Senator from Minnesota, or to attempt to do so. I simply feel that the language in title VI which reads "any requirement" is not clear and that this language would permit the Office of Education, if it desired to do so, to establish a requirement to correct racial imbalance, whatever that is, and I am not sure anyone knows. Of course, the President could approve that requirement without violating the law; and even though President Johnson might not do so, perhaps some subsequent President would approve such a requirement. If that happened, it seems to me the Office of Education could terminate or refuse to grant assistance to any school district in the country if it did not comply with such requirement. Now, the very able and friendly Senator from Minnesota has referred to the making of legislative history on this point. As to legislative history, I should like to read from People against New York Central R.R. Co., Court of Appeals of New York, 1855—these words:

If its language—

Referring to a statute—

is plain and unambiguous, there is no room for construction.

It seems to me that the language "any requirement" is plain and unambiguous.

(At this point Mr. Metcalf took the chair as Acting President pro tempore.)

Mr. HUMPHREY. Unless one has a proviso. We are always adding a proviso to something. We can say, "The President of the United States shall do this, provided that he shall not do that." What we have done here is to provide that, "You shall do certain things, provided that," and then we list what cannot be done.

Mr. BYRD of West Virginia. Where is the proviso in title VI which would prohibit the Office of Education from doing what I have just stated it might conceivably do?

Mr. HUMPHREY. There is such a thing as having a statement written into an act that covers the act. One does not have to repeat it in every other paragraph.

Mr. BYRD of West Virginia. Mr. President, there is—

Mr. JAVITS. Mr. President, will the Senator allow me to interject at that point?

Mr. HUMPHREY. I yield.

Mr. JAVITS. I believe I know what the Senator from West Virginia [Mr. Byrd] is asking about. I had a great deal to do with drafting the point we are talking about.

I should like to point out that the operative words of section 602 in title VI are these: "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance."

I invite the attention of the Senator from West Virginia to page 33, lines 9, 10, and 11 of the amendment in the nature of a substitute.

In short, the only time there can be a cutoff of funds is if the segregation or discrimination is being practiced in respect to a matter which if stopped will still not throw us out in this definition as to the "achievement of the objectives of the statute authorizing the financial assistance."

Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore, there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop

any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative.

Let me give the Senator an example, because we discussed the question in great detail. We discussed in great detail the situation in which a contractor on Government work — that is, work in which the United States puts up some of the money. Assume he is a road contractor and was discriminating in his business against hiring Negroes, but he was not discriminating on that particular job.

I state for the RECORD that because he was discriminating generally, but was not discriminating on that job, we could not cut off his funds because the statute which permitted the Federal Government to put up its share of the money did not apply to the contractor's general business operations. It applied only to the construction of the road.

Mr. BYRD of West Virginia. Only where the funds were being applied.

Mr. JAVITS. The Senator is correct. If his nose was clean, to use a curbstone phrase, in terms of employment practices on the road job, that is as far as we could go.

(At this point, Mr. BURDICK took the chair as Presiding Officer.)

Mr. BYRD of West Virginia. I thank the Senator from New York for his interpretation of the language.

I trust that it will help to clarify the intent of the title. I also thank the Senator from Minnesota for yielding additionally.

In closing, if the Senator from Minnesota will permit me, I should like to read into the RECORD one excerpt from the case of *Woollcott v. Shubert* (111 N.E. 829):

It is established law, however, that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes.

If we are going to talk about legislative history, I believe that we had better not lean too much upon the assurance of the distinguished Senator from Minnesota, which he gave to me in one of the conferences, and which he has reiterated on the floor of the Senate today, that we will, through this debate, establish legislative history to make clear the intent of the statute. I believe that the words of title VI — "any requirement adopted pursuant to this section" — are presently clear in themselves, and words uttered by us, the legislators, in this debate may not constitute competent aids to the courts in establishing a true legislative intent.

Mr. HUMPHREY. I recognize that the Senator has quoted the citation. I can give him quotations contrary to that one, without fear of contradiction. I am not a lawyer, but I have studied jurisprudence, constitutional law, and case law, and I know of no time when a court of competent jurisdiction has said that statements made by legislators relating to a law are without meaning or

that they have no effect upon the interpretation of law or the application of law. To the contrary.

Mr. BYRD of West Virginia. The Senator says he knows of no cases in which the courts have so held. However, I have just cited one case. I can cite the Senator another. *Duplex Printing Press Co. v. Deering* (254 U.S. 443):

By repeated decisions of this court, it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body.

It was for this reason that I joined with others in attempting to send the bill to committee, in the first instance, so that the courts would have a reliable committee report upon which to gage and judge and ascertain the intent of the legislative body.

Mr. HUMPHREY. I say most respectfully to the Senator that in the circumstances in which we find ourselves, if the Senator in charge of the bill, or the Senator who submits an amendment to a bill makes a statement relating to the bill, while it is not conclusive, it is considered to be relevant and considered to be interpretive of the statute.

But there is an easy way to answer the Senator's question: Let the Senator put what he wants into an amendment. I do not see any reason for him to be on the fringes of this issue. All he has to do is to offer an amendment, if he has any doubts.

The Senator has been discussing the amendment with me. There is no problem. I should be happy to join him in encouraging Senators to approve of his amendment.

I should like to make one further reference to the Gary case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of section 4.

Exhibit "G"

CIVIL RIGHTS ACT OF 1964

TITLE IV—

DESEGREGATION OF PUBLIC EDUCATION

DEFINITIONS

Sec. 401. As used in this title —

(a) "Commissioner" means the Commissioner of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

SURVEY AND REPORT OF EDUCATIONAL OPPORTUNITIES

Sec. 402. The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

TECHNICAL ASSISTANCE

Sec. 403. The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

TRAINING INSTITUTES

Sec. 404. The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to im-

prove the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. Individuals who attend such an institute on a full-time basis may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for travel to attend such institute.

GRANTS

Sec. 405. (a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of —

(1) giving to teachers and other school personnel inservice training in dealing with problems incident to desegregation, and

(2) employing specialists to advise in problems incident to desegregation.

(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

PAYMENTS

Sec. 406. Payments pursuant to a grant or contract

under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

Sec. 407. (a) Whenever the Attorney General receives a complaint in writing —

(1) signed by a parent group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin.

and the Attorney General believes the complaint is meritorious and certifies that the signer of such complaints are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the

United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property,

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

Sec. 408. In any action or proceeding under this

title the United States shall be liable for costs the same as a private person.

Sec. 409. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Sec. 410. Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Sec. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Sec. 602. Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall be come effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or

refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to

section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

Sec. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Sec. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

TITLE VII—EQUAL EMPLOYMENT OPPORTUNTY

DEFINITIONS

Sec. 701. For the purposes of this title —

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five

or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided*, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: *Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportuniteis to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment

services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Rela-

tions Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia,

or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment or individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employ-

ment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment

practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organizaton to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to

the premises in or upon which any part of the duties of such position performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions

of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferentail treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of

his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

* * *

EXHIBIT "H"

Excerpts from the 1965 and 1966 Education Acts

EDUCATION ACT OF 1965
PUBLIC LAW 89-110

Sec. 604. Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

FEDERAL CONTROL OF EDUCATION PROHIBITED
EDUCATION ACT OF 1966
PUBLIC LAW 89-750

PART H—RACIAL IMBALANCE AND COMPLIANCE
CIVIL RIGHTS ACT OF 1964

Sec. 181. Section 704 of the Elementary and Secondary Education Act of 1965 (as redesignated by this act, and containing a prohibition against Federal control of education)[1] is amended by inserting the following at the end thereof and before the period: ", or to require the assignment or transportation of students or teachers in order to overcome racial imbalance".

FEDERAL CONTROL PROHIBITED

Sec. 312. (a) Nothing contained in this title shall be

construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system.

(b) The National Advisory Committee on Adult Basic Education is authorized to encourage the establishment of State and local adult education advisory committees in order to improve reporting of State

EXHIBIT "I"

REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE IV OF THE CIVIL RIGHTS ACT OF 1964

March 1966

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

(Superseding the General Statement of Policies Issued in April 1965 — 45 CFR, Part 181)

Subpart A—*Applicability of This Statement of Policies*

§ 181.1 Title VI and the HEW Regulation

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As required by Section 602 of Title VI, the Depart-

ment of Health, Education, and Welfare has issued a Regulation to assure the elimination of discrimination in Federal aid programs it administers. The HEW Regulation was published as Part 80 of Title 45, Code of Federal Regulations (45 CFR Part 80).

§ 181.2 Compliance by School Systems Eliminating Dual School Structure

To be eligible for Federal aid, a school system must act to eliminate any practices in violation of Title VI, including the continued maintenance of a dual structure of separate schools for students of different races. The HEW Regulation recognizes two methods of meeting this requirement: (1) a desegregation order of a Federal court; or (2) a voluntary desegregation plan.

§ 181.3 Purpose of This Statement of Policies

This Statement of Policies applies to public elementary and secondary school systems undergoing desegregation to eliminate a dual school structure. It sets forth the requirements which voluntary desegregation plans must meet for the Commissioner to determine under the HEW Regulation that a plan is adequate to accomplish the purposes of Title VI. This Statement supersedes the "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," issued in April 1965 and published as 45 CFR Part 181.

§ 181.4 Initial Demonstration of Compliance

To be eligible for Federal aid, a school system must

first assure the Commissioner that it will comply with Title VI and the HEW Regulation. It must submit the form of assurance that meets its circumstances, under §§ 181.5, 181.6, or 181.7 below.

§ 181.5 Systems Without Dual School Structure

(a) *Submission of Form 441.* A school system which does not maintain any characteristic of a dual school structure may initially demonstrate compliance by submitting HEW Form 441. This is an assurance of full and immediate compliance with Title VI.

(b) *Resubmission Not Required.* A school system which has appropriately submitted HEW Form 441 need not submit a new copy with subsequent requests for Federal aid, but need only affirm when requested that the assurance submitted continues in effect.

(c) *Supplementation of Assurance.* The Commissioner may require supplementation of HEW Form 441 when he has reasonable cause to believe that there is a failure to comply with any provision of Title VI or the HEW Regulation.

§ 181.6 Systems Under Federal Court Order for Desegregation

(a) *Submission of Order.* A school system under a Federal court desegregation order which meets the requirements of the HEW Regulation may submit, as evidence of compliance with Title VI, a copy of the court order, together with an assurance that it will comply with the order, including any future modification.

(b) *Resubmission Not Required.* A school system under a court order accepted by the Commission need not submit another copy, but must submit any modification not previously submitted.

(c) *Revision of Court Orders.* A school system under a court order for desegregation which is not in accord with current judicial standards is subject to legal action by the Department of Justice, or by the parties to the original suit, to modify the order to meet current standards.

§ 181.7 Systems With Voluntary Desegregation Plans

(a) *Submission of Form 441-B.* A school system with a voluntary desegregation plan must provide an assurance that it will abide by the applicable requirements for such plans contained in this Statement of Policies. Such assurance may be given by submitting HEW Form 441-B to the Commissioner. After April 15, 1966 commitments of funds for new activities will be subject to deferral for school systems which have failed to submit HEW Form 441-B.

(b) *Changing Type of Plan.* A school system may change from one type of desegregation plan to another if such action would eliminate segregation and all other forms of discrimination more expeditiously. A school system planning to change the type of its plan must submit a new plan meeting the requirements of this Statement of Policies, together with HEW Form 441-B, for a determination by the Commissioner as to the adequacy of the plan to accomplish the purposes of Title VI.

(c) *Retaining Present Type of Plan.* A school system with a desegregation plan accepted by the Commissioner need not resubmit its plan if it intends to continue under the same type of plan. If a plan accepted by the Commissioner fails to meet any requirement under this Statement of Policies, the submission of HEW Form 441-B will be deemed to amend the plan so that it will meet such requirement. Amendments to the plan are not to be submitted unless requested. However, certain supporting materials must be submitted, as provided in Subparts B, C, D, and F below.

(d) *Initial Submittal of Plans.* If no desegregation plan has been submitted or accepted for a school system, HEW Form 441-B and a plan meeting the requirements of this Statement of Policies must be submitted.

[§§ 181.8 through 181.10 reserved]

Subpart B—*Basic Requirements for All Voluntary Desegregation Plans*

§ 181.11 Various Types of Desegregation Plans

It is the responsibility of a school system to adopt and implement a desegregation plan which will eliminate the dual system and all other forms of discrimination as expeditiously as possible. No single type of plan is appropriate for all school systems. In some cases, the most expeditious means of desegregation is to close the schools originally established for students of one race, particularly where they are small, inadequate and to assign all the students and teachers to desegregated schools. Another appropriate method is to reorganize the grade

structure of schools originally established for students of different races so that these schools are fully utilized, on a desegregated basis, although each school contains fewer grades. In some cases desegregation is accomplished by the establishment of non-racial attendance zones. Under certain conditions, a plan based on free choice of school may be a way to undertake desegregation. In certain cases the purposes of Title VI may be most expeditiously accomplished by a plan applying two or more of the foregoing procedures to certain schools or different grade levels. Based on consideration of all the circumstances of a particular school system, the Commissioner may determine that its desegregation plan is not adequate to accomplish the purposes of Title VI, in which case he may require the adoption of an alternative plan. In any case where the State education agency is pursuing policies and programs for expediting the elimination of the dual school structure, the Commissioner will consider this factor in determining whether a particular type of plan is adequate for any given school system in such State.

§ 181.12 Student Assignment Practices

Title VI precludes a school system from any action or inaction designed to perpetuate or promote segregation or any other form of discrimination, or to limit desegregation or maintain what is essentially a dual school structure. Any educational opportunity offered by a school system must be available to students without regard to race, color, or national origin. In particular, any academic tests or other procedures used in assigning students to schools, grades, classrooms, sections, courses of study or for any other purpose must be applied

uniformly to all students without regard to race, color, or national origin. Curriculum, credit and promotion procedures must not be applied in such a way as to penalize or hamper students who transfer from one school to another pursuant to a desegregation plan.

§ 181.13 Faculty and Staff

(a) *Desegregation of Staff.* The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are subjected to discrimination in educational programs. Each school system is responsible for correcting the effects of all past discriminatory practices in the assignment of teachers and other professional staff.

(b) *New Assignments.* Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments.

(c) *Dismissals.* Teachers and other professional staff may not be dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race, color, or national origin. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system may be filled through recruitment from outside the system unless the school officials can show that no such displaced staff member is qualified to fill the vacancy. If as a result of desegre-

gation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system must be evaluated in selecting the staff members to be released.

(d) *Past Assignments.* The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students of a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority of, the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1966-67 school year must include significant progress beyond what was accomplished for the 1965-66 school year in the desegregation of teachers assigned to schools on a regular full-time basis. Patterns of staff assignment to initiate staff desegregation might include, for example: (1) Some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully.

(a) *General.* Each school system is responsible for removing any segregation and any other form of discrimination affecting students in connection with all transportation, athletics, and other extra-curricular activities) that may be conducted or sponsored by or affiliated with the schools of the system.

(b) *Specific Situations.*

(1) A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer student.

(2) If transportation services are furnished, sponsored or utilized by a school system, dual or segregated transportation systems and any other form of discrimination must be eliminated. Routing and scheduling of transportation must be planned on the basis of such factors as economy and efficiency, and may not operate to changed to the extent necessary to comply with this provision.

(3) All school-related use of athletic fields, meeting rooms, and all other school-related services, facilities, activities, and programs, such as commencement exercises and parent-teacher meetings, which are open to persons other than enrolled students, must be open to all such persons and must be conducted without segregation or any other form of discrimination.

(4) All special educational programs, such as preschool, summer school and adult education, and any educational program newly instituted, must be conducted

without segregation or any other form of discrimination. Free choice desegregation procedures normally may not be applied to such programs.

§ 181.15 Unequal Educational Programs and Facilities

In addition to the changes made in student assignment practices under its desegregation plan, each school system is responsible for removing all other forms of discrimination on the ground of race, color, or national origin. For example, some school systems still maintain small, inadequate schools that were originally established for students of a particular race and are still used primarily or exclusively for the education of students of such race. If the facilities, teaching materials, or educational program available to students in such a school are inferior to those generally available in the schools of the system, the school authorities will normally be required immediately to assign such students to other schools in order to discontinue the use of the inferior school.

§ 181.16 Attendance Outside School System of Residence

No arrangement may be made nor permission granted school in another school system in any case (1) where the result would tend to limit desegregation or maintain what is essentially a dual school structure in either system, or (2) where such attendance is not available to all students without regard to race, color, or national origin.

§ 181.17 Official Support for Desegregation Plan

(a) *Community Support.* School officials must take steps to encourage community support and acceptance of their desegregation plan. They are responsible for preparing students, teachers and all other personnel, and the community in general, for the successful desegregation of the school system.

(b) *Information to the Public.* Full information concerning the desegregation plan must be furnished freely to the public and to all television and radio stations and all newspapers serving the community. Copies of all reports on student and staff assignments required under § 181.18 below must be available for public inspection at the office of the Superintendent of the school system.

(c) *Protection of Persons Affected.* Each school system is responsible for the effective implementation of its desegregation plan. Within their authority, school officials are responsible for the protection of persons exercising rights under, or otherwise affected by, the plan. They must take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan, whether or not on school grounds. If officials of the school system are not able to provide sufficient protection, they must seek whatever assistance is necessary from other appropriate officials.

§ 181.18 Reports

(a) *Anticipated Enrollment.* By April 15 of each year, or by 15 days after the close of the spring choice period in the case of plans based on free choice of schools,

each school system must report to the Commissioner the anticipated student enrollment, by race, color, or national origin, and by grade of each school, for the following school year. The report submitted for the 1966-67 school year must also include the comparable data for the 1965-66 school year. Any subsequent substantial change in anticipated enrollment affecting desegregation must be reported promptly to the Commissioner.

(b) *Planned Staff Assignments.* By April 15 of each year, each school system must report to the Commissioner the planned assignments of professional staff to each school for the following year, by race, color, or national origin and by grade, or where appropriate, by subject taught or position held. The report for April 15, 1966 must also include the comparable data for the 1965-66 school year. Any subsequent change in planned staff assignments affecting staff desegregation must be reported promptly to the Commissioner.

(c) *Actual Data.* As soon as possible after the opening of its schools in the fall, but in any case within 30 days thereafter, each school system must determine and promptly report to the Commissioner the actual data for the items covered in the reports called for under (a) and (b) above.

(d) *Attendance Outside System of Residence.* The reports called for under (a) and (c) above must include a statement covering (1) all students who reside within the boundaries of the school system but attend school in another system, and (2) all students who reside outside but attend a school within the system. This statement must set forth, for each group of students included

in (1) and (2) above, the number of students, by race, color, or national origin, by grade, by school and school system attended, and by school system of residence.

(e) *Consolidation or Litigation.* A school system which is to undergo consolidation with another system or any other change in its boundaries, or which is involved in any litigation affecting desegregation, must promptly report the relevant facts and circumstances to the Commissioner.

(f) *Other Reports.* The Commissioner may require a school system to submit other reports relating to its compliance with Title VI.

§ 181.19 Records

A school system must keep available for not less than three years all records relating to personnel actions, transportation, including routes and schedules, and student assignments and transfers, including all choice forms and transfer applications submitted to the school system. The Commissioner may require retention for a longer period in individual cases.

[§§ 181.20 through 181.30 reserved]

Subpart C—*Additional Requirements for Voluntary Desegregation Plans Based on Geographic Attendance Zones*

§ 181.31 General

A voluntary desegregation plan based in whole or in part on geographic attendance zones must meet the re-

quirements of this Subpart for all students whose assignment to schools is determined by such zones. The general requirement for desegregation plans set forth elsewhere in this Statement of Policies are also applicable.

§ 181.32 Attendance Zones

A single system of non-racial attendance zones must be established. A school system may not use zone boundaries or feeder patterns designed to perpetuate or promote segregation, or to limit desegregation or maintain what is essentially a dual school structure. A school system planning (1) to desegregate certain grades by means of geographic attendance zones and other grades by means of free choice of schools, or (2) to include more than one school of the same level in one or more attendance zones and to offer free choice of all schools within such zones, must show that such an arrangement will most expeditiously eliminate segregation and all other forms of discrimination. In any such case, the procedures followed for the offer, exercise and administration of free choice of schools must conform to the provisions of Subpart D below.

§ 181.33 Assignment to School in Zone of Residence

Regardless of any previous attendance at another school, each student must be assigned to the school serving his zone of residence, and may be transferred to another school only in those cases which meet the following requirements:

(a) *Transfer for Special Needs.* A student who requires a course of study not offered at the school serving

his zone, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit, or offers courses for, his special needs.

(b) *Minority Transfer Policy.* A school system may (1) permit any student to transfer from a school where students of his race are a majority to any other school, within the system, where students of his race are a minority, or (2) assign students on such basis.

(c) *Special Plan Provisions.* A student who specifically qualifies to attend another school pursuant to the provisions of a desegregation plan accepted by the Commissioner may be permitted, upon his written application, to transfer to such other school.

§ 181.34 Notice

(a) *Individual Notice.* On a convenient date between March 1 and April 30 in each year, each school system must distribute, by first class mail, a letter to the parent, or other adult person acting as parent, of each student who is then enrolled, except high school seniors expected to graduate, giving the name and location of the school to which the student has been assigned for the coming school year pursuant to the desegregation plan, and information concerning the bus service between his school and his neighborhood. All these letters must be mailed on the same day. Each letter must be accompanied by a notice, in a form prescribed by the Commissioner, explaining the desegregation plan. The same letter and notice must also be furnished, in person or by mail, to the parent of each prospective student, including each

student planning to enter the first grade or kindergarten, as soon as the school system learns that he plans to enroll.

(b) *Published Notice.* The school system must arrange for the conspicuous publication of an announcement, identical with the text of the notice provided for under (a) above, in the newspaper most generally circulated in the community, on or shortly before the date of mailing under (a) above. Publication as a legal notice is not sufficient. Whenever any revision of attendance zones is proposed, the school system must similarly arrange for the conspicuous publication of an announcement at least 30 days before any change is to become effective, naming each school to be affected and describing the proposed new zones. Copies of all material published hereunder must also be given at that time to all television and radio stations serving the community.

(c) *Maps Available to Public.* A street or road map showing the boundaries of, and the school serving, each attendance for public inspection at the office of the Superintendent. Each school in the system must have freely available for public inspection a map showing the boundaries of its attendance area.

§ 181.35 Reports

(a) *Attendance Zones.* The report submitted under § 181.18(a) by April 15 of each year must be accompanied by a map, which must show the name and location of each school facility planned to be used during the coming school year, the attendance zones for each school in effect during the current school year, and any

changes in the attendance zones planned for the coming school year. The map need not be of professional quality. A clipping of each newspaper announcement and any map published under § 181.34 (b) or (c) above must be sent to the Commissioner within three days after publication and; in the case of proposed revisions, must be accompanied by data showing the estimated change in attendance, by race, color, or national origin and by grade, and in the racial composition of the professional staff, at each school to be affected.

(b) *Attendance Outside Zone of Residence.* Whenever a student is permitted to attend a school other than that serving his zone of residence, and whenever a request for such attendance is denied, the school system must retain records showing (1) the school and grade applied for, (2) the zone of the student's residence and his grade therein, (3) the race, color, or national origin of the student, (4) the reason stated for the request, and (5) the reason the request is granted or denied. Whenever the total number of transfers permitted from any school exceeds two percent of the student enrollment at that school, the relevant facts must be reported promptly to the Commissioner.

[§§ 181.36 through 181.40 reserved]

Subpart D—*Additional Requirements for Voluntary Desegregation Plans Based on Free Choice of Schools*

§ 181.41 General

A voluntary desegregation plan based in whole or in part on free choice of schools must meet the requirements of this Subpart for all students whose assignment to

schools is determined by free choice. The general requirements for desegregation plans set forth elsewhere in this Statement of Policies are also applicable.

§ 181.42 Who May Exercise Choice

A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent, or other adult person acting as his parent, during the period in which the student exercises his choice. Each reference in this Subpart to a student exercising a choice means the exercise of the choice by a parent or such other adult, or by the student himself, as may be appropriate under this provision.

§ 181.43 Annual Mandatory Exercise of Choice

Each student must be required to exercise a free choice of schools once annually. A student may not be enrolled or assigned to a school without exercising his choice, except as provided in § 181.45 below.

§ 181.44 Choice Period

A period of at least 30 days must be provided for exercising choice, to commence no earlier than March 1 and to end no later than April 30, preceding the school year for which choice is to be exercised. The Commissioner may require an additional period or different

dates for a particular school system. No preference in school assignment may be given on the basis of an early exercise of choice during the choice period.

§ 181.45 Failure To Exercise Choice

A failure to exercise a choice within the choice period does not excuse a student from exercising his choice, which may be done at any time before he commences school for the year with respect to which the choice applies. However, any such late choice must be subordinated to the choices of students who exercised choice during the choice period. If by a week after school opens there is any student who has not yet exercised his choice of school, he must be assigned to the school nearest his home where space is available. Standards for determining available space must be applied uniformly throughout the system.

§ 181.46 Letters to Parents, Notices, and Choice Forms

(a) *Mailings.* On the first day of the choice period, each school system must distribute, by first class mail, a letter, an explanatory notice, and a choice form, to the parent or other adult person acting as parent of each student who is then enrolled, except high school seniors expected to graduate, together with a return envelope addressed to the Superintendent. The texts for the letter, notice, and choice form to be used must be in a form prescribed by the Commissioner.

(b) *Extra Copies.* Extra copies of the letter, the notice, and the choice form must be freely available to parents, students, prospective students, and the general

public, at each school in the system and at the office of the Superintendent.

(c) *Content of Choice Form.* Unless otherwise authorized or required by the Commissioner, each choice form, as prepared by the school system for distribution, (1) must set forth the name and location of, and the grades offered at, each school, and (2) may inquire of the person exercising the choice only the name, address, and age of the student, the school and grade currently or most recently attended by the student, the school chosen, the signature of one parent or other adult person serving as parent or, where appropriate under § 181.42 above, the signature of the student, and the identity of the person signing. If necessary to provide information required by §§ 181.18 and 181.19 above, or for other reports required by the Commissioner, the choice may also ask the race, color, or national origin of the student. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested. No other choice form, including any pupil placement law form may be used by the school system in connection with the choice of a school.

(d) *Return of Choice Form.* At the option of the person completing the choice form, it may be returned by mail or by hand to any school in the school system or to the office of the Superintendent.

(e) *Choices Not on Official Form.* Exercise of choice may also be made by the submission in like manner of any other writing which sufficiently identifies the student and indicates that he has made a choice of a school.

§ 181.47 Prospective Students

Each prospective student, including each student planning to enter the first grade or kindergarten, must be required to exercise a free choice of schools before enrollment. Each such student must be furnished a copy of the prescribed letter, notice, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Each must be given an opportunity to exercise his choice during the choice period. A prospective student exercising his choice after the choice period must be given at least one week to do so.

§ 181.48 Choice May Not Be Changed

Once a choice has been submitted, it may not be changed for the school year to which it applies, whether during the choice period, after the choice period, or during that school year, except on request (1) in cases meeting the conditions set forth in § 181.50 below, (2) in case of a change of residence to a place where another school serving the student's grade level is closer than the school to which he is assigned under these provisions, and (3) in case of a compelling hardship. A student who cannot enter the school of his choice because the grade he is to enter is not offered at that school must be promptly notified as soon as this is known and must be given the same opportunity to choose another school as is provided a prospective student under § 181.47 above.

§ 181.49 Assignment According to Choice

No choice may be denied in assigning students to schools for any reason other than overcrowding. In cases

where overcrowding would result at one or more schools from the choices made, preference must be given on the basis of the proximity of schools to the homes of students, without regard to race, color, or national origin. No preference may be given to students for prior attendance at a school if such preference would deny other students their free choice of schools under the plan. In cases where this provision would result in unusual difficulty involving, for instance, students not being able to finish their senior year in a particular school, or students being unable to attend school with other members of the same family, or at a school having special courses required by a student, the relevant facts may be brought to the attention of the Commissioner for consideration of alternative procedures. Any student whose choice is denied under these provisions must be notified in writing promptly and given his choice of each school in the system serving his grade level where space is available. Standards for determining overcrowding and available space that are applied uniformly throughout the system must be used if any choice is to be denied. Each student and his parent, or other adult person acting as parent, must be notified in writing of the name and location of the school to which the student is assigned hereunder promptly upon completion of processing his first or any second choice. A school system may, at its option, give preference to any student whose choice is for a school at which students of his race are a minority.

§ 181.50 Transfers for Special Needs

Each student must attend the school to which he is assigned under the foregoing provisions, except that any student who requires a course of study not offered at

that school, or who is physically handicapped, may be permitted, upon his written application, to transfer to another school which is designed to fit, or offers courses for, his special needs.

§ 181.51 No Limitation of Choice; Transportation

No factor, such as a requirement for health or birth records, academic or physical examinations, the operation of the school transportation system, or any other factor except overcrowding, may limit or affect the assignment of students to schools on the basis of their choices. Where transportation is generally provided, buses must be routed to the maximum extent feasible so as to serve each student choosing any school in the system. In any event, every student choosing either the formerly white or the formerly Negro school (or other school established for students of a particular race, color, or national origin) nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

§ 181.52 Officials Not To Influence Choice

No official, teacher, or employee of the school system may require or request any student or prospective student to submit a choice form during the choice period other than by the prescribed letter, notice, and choice form. After the choice period, the school system must make all reasonable efforts to obtain a completed choice form from any student who has not exercised a choice.

However, at no time may any official, teacher, or employee of the school system, either directly or indirectly, seek to influence any parent, student, or any other person involved, in the exercise of a choice, or favor or penalize any person because of a choice made. Information concerning choices made by individual students or schools to which they are assigned may not be made public.

§ 181.53 Public Notice

On or shortly before the date the choice period opens, the school system must arrange for the conspicuous publication of a notice describing the desegregation plan in the newspaper most generally circulated in the community. The text of the notice must be in a form prescribed by the Comissioner. Publication as a legal notice is not sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Any other announcement published by the school system concerning enrollment, such as might be made in connection with scheduling pre-enrollment procedures for prospective first grade students, must (1) state clearly that under the desegregation plan a choice of school is required for each student whose choice has not yet been exercised, (2) describe and state where copies of the prescribed letter, notice and choice form may be freely obtained in person, or by letter or telephone request, and (3) state the period during which the choice may be exercised.

§ 181.54 Requirements for Effectiveness of Free Choice Plans

A free choice plan tends to place the burden of deseg-

regation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group studnts.

For these reasons, the Commissioner will scrutinize with special care the operation of voluntary plans of desegregation in school systems which have adopted free choice plans.

In determining whether a free choice plan is operating fairly and effectively, so as to materially further the orderly achievement of desegregation, the Commissioner will take into account such factors as community support for the plan, the efforts of the school system to eliminate the identifiability of schools on the basis of race, color, or national origin by virtue of the composition of staff or other factors, and the progress actually made in eliminating past dicrimination and segregation.

The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools. Thus, when substantial desegregation actually occurs under a free choice plan, there is strong evidence that the plan is operating effectively and fairly, and is currently acceptable as a means of meeting legal requirements. Conversely, where a free choice plan results in little or no actual desegregation,

or where, having already produced some degree of desegregation, it does not result in substantial progress, there is reason to believe that the plan is not operating effectively and may not be an appropriate or acceptable method of meeting constitutional and statutory requirements.

As a general matter, for the 1966-67 school year the Commissioner will, in the absence of other evidence to the contrary, assume that a free choice plan is a viable and effective means of completing initial stages of desegregation in school systems in which a substantial percentage of the students have in fact been transferred from segregated schools. Where a small degree of desegregation has been achieved and, on the basis of the free choice registration held in the spring of 1966, it appears that there will not be a substantial increase in desegregation for the 1966-67 school year, the Commissioner will review the working of the plan and will normally require school officials to take additional actions as a prerequisite to continued use of a free choice plan, even as an interim device.

In districts with a sizable percentage of Negro or other minority group students, the Commissioner will, in general, be guided by the following criteria in scheduling free choice plans for review:

(1) If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfers on the order of at least twice that percentage would normally be expected.

(2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965-66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965-66 school year.

(3) If a lower percentage of students transferred for the 1965-66 school year, then the rate of increase in total transfers for the 1966-67 school year would normally be expected to be proportionately greater than under (2) above.

(4) If no students transferred from segregated schools under a free choice plan for the 1965-66 school year, then a very substantial start would normally be expected, to enable such a school system to catch up as quickly as possible with systems which started earlier. If a school system in these circumstances is unable to make such a start for the 1966-67 school year under a free choice plan, it will normally be required to adopt a different type of plan.

Where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation.

Such additional steps may include, for example, reopening of the choice period, additional meetings with parents and civic groups, further arrangements with

State or local officials to limit opportunities for intimidation, and other further community preparation. Where schools are still identifiable on the basis of staff composition as intended for students of a particular race, color, or national origin, such steps must in any such case include substantial further changes in staffing patterns to eliminate such identifiability.

If the Commissioner concludes that such steps would be ineffective, or if they fail to remedy the defects in the operation of any free choice plan, he may require the school system to adopt a different type of desegregation plan.

§ 181.55 Reports

(a) *Supporting Materials.* Each school system must submit to the Commissioner a copy of the letter, notice, and choice form, all as prepared by the school system for distribution, within three days after their first distribution, and must submit a clipping of all newspaper announcements published in accordance with § 181.53 above within three days after publication.

(b) *Data on Choices Not Being Honored.* In any case, including the case of conflicting choices under § 181.42 above, where a student chooses a school where he would be in a racial minority, and (1) he is to be majority, or (2) the school system proposes not to process his choice for any reason, the relevant facts must be reported promptly to the Commissioner.

(c) *Transfers for Special Needs.* Wherever a student is permitted, under §§ 181.48 or 181.50 above, to

attend a school other than the school to which he is or would be assigned under the other applicable provisions hereof, and whenever a request for such attendance is denied, the school system must retain records showing (1) the school and grade applied for, (2) the school and grade to be transferred from, (3) the race, color, or national origin of the student, (4) the reason stated for the request, and (5) the reason the request is granted or denied. Whenever the total number of transfers permitted from any school exceeds two percent of the student enrollment at that school, the relevant facts must be reported promptly to the Commissioner.

[§§ 181.56 through 181.60 reserved]

Subpart E—*Miscellaneous Provisions*

§ 181.61 How To Submit Reports

Each report to the Commissioner required under this Statement of Policies must be sent by first class mail addressed to the Equal Educational Opportunities Program, U. S. Office of Education, Washington, D. C., 20202.

§ 181.62 Alternative Administrative Procedures

If an administrative procedure provided for under this Statement of Policies is not administratively feasible in a particular situation, the Commissioner may accept an alternative procedure if he determines that it will accomplish the same purpose.

§ 181.63 Revision of Statement of Policies

The Commissioner may modify this Statement of Pol-

icies as may be necessary to accomplish the purposes of Title VI.

§ 181.64 Copies of Documents for State Agencies

Each school system submitting any plan form or report to the Commissioner under this Statement of Policies must also submit a copy of such form or report to the appropriate State education agency.

§ 181.65 Choice Period Already Begun

In the event that any school system with a desegregation plan based on free choice has begun or completed its free choice period for the 1966-67 school year prior to the date of issue of this Statement of Policies, the school system must immediately report to the Commissioner its proposals for adapting its free choice procedures in such a way as to make them substantially conform to the provisions of this Statement of Policies.

§ 181.66 Definitions

(a) The term "Commissioner" means the U. S. Commission of Education or any official acting under assignment or delegation from him to carry out any of his functions under this Statement of Policies.

(b) The term "discrimination" means discrimination on the ground of race, color, or national origin.

(c) The term "dual school structure" means a system of separate school facilities for students based on race, color, or national origin.

(d) The term "HEW Form 441" means the printed

document provided for the use of certain school systems by the U. S. Department of Health, Education, and Welfare, entitled "Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964."

(e) The term "HEW Form 441-B" means the printed document provided for the use of certain school systems by the U. S. Department of Health, Education, and Welfare entitled "Assurance of Compliance with the Revisd Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964."

(f) The term "HEW Regulation" means the Regulation issued pursuant to Title VI of the Civil Rights Act of 1964 by the U.S. Department of Health, Education, and Welfare (Part 80, of Title 45, Code of Federal Regulations).

(g) The term "parent" means an adult individual who exercises parental control over, or is otherwise acting as parent of, a student or prospective student.

(h) The term "school official" shall include, but is not limited to, any person who serves on the governing board of a school system, or attends meetings of such board in an official capacity, and all administrative and supervisory personnel of a school system.

(i) The term "school system" means, as the context may require, either (1) a legally constituted school authority (such as a local board of education) which has administrative control of one or more elementary or secondary schools, (2) the geographic area over which

any such school authority has administrative control for school purposes, or (3) the schools and facilities over which any such school authority has administrative control.

(j) The term "Statement of Policies" means this Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964.

(k) The term "Title VI" means Title VI of the Civil Rights Act of 1964 (PL 88-352, 42 USC 2000d to 2000d-4).

[§§ 181.67 to 181.70 reserved]

EXHIBIT "J"

Excerpts from the Deposition of Herbert C. Kane, Area Director of Area IV of the Equal Education Opportunity Program of the Office of Education of the Department of Health, Education and Welfare, which area includes the State of Louisiana.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Pine Bluffs Division

Civil Action No. PB66C94

Washington, D. C.,

Thursday, January 26, 1967

DERMOTT SPECIAL SCHOOL DISTRICT
OF CHICOT COUNTY,

Plaintiff

versus

JOHN W. GARDNER, As Secretary of the
Department of Health, Education and Welfare
and
HAROLD HOWE, II, AS UNITED STATES
COMMISSIONER OF EDUCATION,

Defendants.

Deposition of HERBERT C. KANE

a witness, called for examination by counsel for the plaintiff, pursuant to agreement of counsel, in Room 3523, General Services Administration Region 3, 7th and D Streets, Southwest, Washington, D. C., beginn-

ing at 11:00 a.m., before Adam A. Giebel, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

A. That is correct.

Q. Now, what is desegregation as you use the term in that context?

A. Desegregation as I use the term, involves a situation where so far as the pupils are concerned each of the pupils has an opportunity to attend school with members either of majority or a minority group. Whether the differentiation is based upon race, color or national origin. And over and above the opportunity that a certain amount at least of progress in this area be demonstrated in each of the school districts. And so far as the faculty is concerned that the faculty assignments be such as to provide the pupils with the opportunity to be taught by members of the minority and majority again as the case might be.

Q. So desegregation as it is administered by your office, comprehends not only the opportunity to freely choose a school but also comprehends the exercise of that opportunity by some significant number of students that results in them being in a desegregated situation?

A. That is correct.

Q. Now, I take it from what you have already testified, that in the Dermott School District your office is satisfied that the opportunity was extended but is dis-

satisfied with the number of persons availing themselves of the opportunity.

BY MR. LIGHT:

Q. How many more Negro students does the Dermott School District need to get into a desegregated situation during this school year to have its eligibility restored by your office for Federal financial assistance?

A. Assuming that the faculty meets the requirements — MR. SMITH: Before he answers that question it should be pointed out that he has already stated that he does not make the ultimate decision on where a school district is in compliance. He makes only recommendations. It is not proper to ask him how many students would be required for compliance.

BY MR. LIGHT:

Q. Mr. Kane, I will amend my question to ask you how many more Negro students in a desegragation situation would be required in order to prompt you to recommend that the district status be changed from non-compliance to one of compliance?

A. I would assume that approximately 50 more Negro students under these circumstances would indicate that the plan was working to some degree.

Q. The complaint in this lawsuit alleges that there are 12 Negro students in the previously white school and assuming that figure to be correct, or approximately correct, that would be your expection that the district should have approximately 60 or 62 Negro stu-

dents in the previously white schools in this current year in order to be in compliance?

* * *

MR. FOSTER: Excuse me, but are we speculating again in terms of what you would like to see in order to recommend that the status be restored?

THE WITNESS: Yes.

MR. LIGHT: I think the record is clear on that.

MR. FOSTER: Okay.

BY MR. LIGHT:

Q. Under the policies of your office what procedure do you expect the Dermott School District to follow in placing this additional some 50 Negro students in a desegregated situation-

A. Well, this is for the school board. The onus is not upon the office but rather upon the school board to desegregate the schools.

Q. If the board arbitrarily selected 50 Negro students and assigned them to the previously white school would that satisfy your office?

A. Yes, that is one of the methods that could be used.

Q. What suggestions has your office made to the Dermott School District with respect to bringing itself into compliance with your policies?

A. At what point? We have made innumerable suggestions.

Q. Well, I would just like for you to tell me all that you recall that have been made to this school district.

A. Well, we have suggested among other things that the choice period be re-opened and re-run. We have suggested that —

* * *

Q. Are those all the states?

A. That is right.

Q. So the amount of integration in terms of percentage of the minority groups that have availed themselves of it has varied rather widely in the states in your areas of responsibility?

A. There has been a wide variation but the question of — the way the question is put "to avail themselves of it" I do not think can be answered in this way because in many instances we have school districts that have completely desegregated.

Q. Now, what do you mean by completely desegregated?

A. By closing the Negro or the white school and teaching all the children in a single educational institution, a single school or school grouping.

Q. That is the ultimate objective of the enforcement of the guidelines, is it not?

A. That is correct. The ultimate objective is to eliminate the dual school system and there are other districts that have by virtue of geographic plans, achieved this degree of desgregation, so that the others that have been pairing or assignment, the implication in the question that it was all free choice therefore must, of necessity, be watched.

Q. In the areas for which you are responsible, has the enforcement of the guidelines tended to achieve more racial balance than existed before the guidelines were enforced?

MR. FOSTER: Objection to the use of the term "racial balance." I believe it would be a term of art. I think it would call for a conclusion on the part of the witness that would be based on material that hasn't been yet covered and certainly is not in evidence.

THE WITNESS: I don't know what the term "racial balance" means.

BY MR. LIGHT:

Q. Is this a term with which you are familiar, Mr. Kane?

A. It is a term I have heard, but I have never been able to find a definition.

Q. Well, let's take the Dermott School as a concrete example.

A. All right.

Q. If the pleadings are correct there are now 12 Negro children and several hundred white children in that school. Is this more racially balanced that it was when all the Negro children went to the Chicot County school and all of the white children went to the Dermott school?

A. I don't know. I have no frame of reference for the term.

Q. Does the Office of Education to your knowledge have any policy respecting the use of the term "racial balance" in administration of its business?

A. Not that I know of.

Q. Isn't there in fact a policy to treat that term just as you now treat it, by denying any knowledge of what it means?

MR. FOSTER: Objection, the witness previously answered the question that to his knowledge there is no policy in the Office of Education to refer to the term "racial balance" in any given way.

BY MR. LIGHT:

Q. Mr. Kane, you are the chief officer to enforce the guidelines for in an area of five —

A. Four.

Q. Four?

(Discussion off the record.)

BY MR. LIGHT:

Q. Mr. Kane, you are the Chief enforcement officer to enforce the guidelines in the area consisting of five states of the Union?

A. That is correct.

Q. As such, are you aware of any limitations or inhibitions on your official conduct in the field of atempting to achieve racial balance among students or faculty in the schools in your district?

A. There is a referral to racial balance, I believe, in Title IV of the Civil Rights Act. However, I am not the individual who is responsible for Title IV operations. My responsibility was within Title VI.

Q. You are aware, though, that the Civil Rights Act of 1964 contains the terminology "racial balance" and also "racial imbalance."

A. I believe it does, yes.

Q. But those references in the Act don't affect your responsibilities and, therefore, you haven't studied the matter any more than you have just indicated here?

A. That is correct.

Q. And in the discharge of the duties that you presently have are you aware of any way that the references in the Act to racial balance or imbalance have affected your job or your duties?

A. No. They have nothing at all to do with the implementation of Title VI.

Q. Rightly or wrongly, you have been able to discharge your obligations in this job without being aware of any limitations on the discharge of your duties by those terms in the Civil Righst Act?

A. That is right.

Q. You haven't paid any attention to them, is that right?

A. Right.

Q. Now, Mr. Kane, assume for a moment without implying

EXHIBIT "K"

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No._____

CADDO PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

UNITED STATES OF AMERICA
Respondents

* * *

No._____

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

UNITED STATES OF AMERICA
Respondents

* * *

No._____

JACKSON PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

MARGARET M. JOHNSON, ET AL.,
Respondents

* * *

No._____

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

YVORNIA DECAROL BANKS, ET AL.,
Respondents

* * *

No._____

CITY OF MONROE, LOUISIANA, ET AL.,
Petitioners

versus

JIMMY ANDREWS, ET AL.,
Respondents

* * *

No._____

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL,
Petitioners

versus

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents

APPLICATION FOR STAY AND/OR SUSPENSION OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States and Circuit

Justice for the Fifth Circuit:

Petitioners, Caddo Parish School Board, et al., Bossier Parish School Board, et al., Jackson Parish School Board, et al., Claiborne Parish School Board, et al., City of Monroe, Louisiana, et al., East Baton Rouge Parish School Board, et al., all of the State of Louisiana pray that an order be entered staying and/or suspending the mandate of the United States Court of Appeals for the Fifth Circuit, which issued in an opinion dated March 29, 1967, pending the filing of a petition for certiorari and a final determination of the matter by this Court. In support of this application, petitioners respectfully show as follows:

1. Your petitioners, six school boards of the State of Louisiana, have previously been under District Court orders to desegregate their school system. Pursuant to said orders, all grades in the school systems will be fully desegregated in the 1967-1968 school year. Each student will have the opportunity to choose the school he wishes to attend. The respondents herein appealed to the United States Fifth Circuit alleging that the plans placed in operation by the District Courts were deficient in some respects.

2. On December 29, 1966, the United States Court of Appeals for the Fifth Circuit in a two to one decision, issued an opinion and a degree from which your petitioners applied for rehearing. A rehearing was granted and on March 10, 1967, the Court en banc heard oral argument thereon. On March 29, 1967, said Court of Appeals in an eight to four decision rendered an opinion adopting with clarifying statements the opinion

of December 29, 1966, and with minor changes the decree of December 29, 1966. The Court further stated that the mandate would issue immediately.

3. That your petitioners herein have filed a request with the Court of Appeals for the Fifth Circuit asking that the said mandate be recalled and/or stayed for a period of time sufficient to permit your petitioners to apply for certiorari to the United States Supreme Court. A copy of the two opinions rendered by the United States Court of Appeals for the Fifth Circuit, as well as the order denying the application for recall and/or stay of mandate, are attached hereto.

4. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. § 1254(1). Jurisdiction to issue the stay requested is granted by 28 U.S.C. § 2101(f).

5. *Reason for seeking certiorari.* In determining the appropriateness of a stay of a mandate pending certiorari proceedings in this Court, a Circuit Justice must inquire as to whether any of the matters proposed to be raised in the petition for certiorari are "sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari" or some form of interim relief. *Edwards v. United States*, 76 S.Ct. 1058, 1 L.Ed. 2d 17. Petitioners submit that there are several major issues to be raised in the petition for certiorari which warrant a stay under this standard:

(a) In order to properly present the condition under which this application is made it must be noted

that even if the stay is granted, all grades in each of the respective school systems will be completely desegregated in the 1967-1968 school year. Petitioners are not proporting to oppose the question of desegregation as announced in *Brown vs. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 9 L.Ed. 873 and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, nor is the question of deliberate speed at issue herein. *Board of School Commissioners of Mobile County v. Davis*, 375 U.S. 41, 85 S.Ct. 10.

(b) The decision below conflicts in many instances with previous decisions of this Court.

(1) The decree issued by the Court seeks by its very nature to require circuit wide conformity rather than allowing district courts to exercise the discretion as set forth in *Brown v. Board of Education*, 349 U. S. 483, 75 S.Ct. 753.

(2) The opinion of the Court placing on the school officials the affirmative duty of overcoming voluntary racial inbalance imposes an obligation foreign to previous decisions of this Court. *Brown v. Board of Eucation* 347 U. S. 483, 74 S. Ct. 686; 349 U.S. 294, 75 S. Ct. 753; *Cooper v. Aaron*, 358 U. S. 1, 78 S.Ct. 1401; *Goss v. Board of Education of City of Knoxville*, 373 U. S. 683, 83 S.Ct. 1405.

(3) The opinion of the Court raises a presumption that basic Constitutional issues may be sectionalized rather than applying uniformly as "the fundamental and paramount law of the nation". *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60; *Cooper v. Aaron*, supra. Constitu-

tional rights must not apply differently merely by virtue of the Circuit in which one resides.

(4) The opinion holding that a freedom of choice plan is constitutional only so long as it results in appreciable racial balancing is contrary to the opinion of this Court in *Goss v. Board of Education of City of Knoxville*, 373 U.S. 683, 687; 83 S.Ct. 1405, 1408.

(5) Despite the fact that no evidence whatsoever was taken in the District Courts concerning faculty and staff desegregation, the opinion requires not only faculty desegregation, but racial balancing. Such a pronouncement without an evidentary hearing runs contrary to previous decisions of this Court. *Bradley v. School Board of Richmond*, 382 U.S. 103, 15 L.Ed.2d 187, *Rogers v. Paul*, 382 U.S. 198, 15 L.Ed.2d 265.

(6) The opinion below approves the validity of the H.E.W. Guidelines and proclaims them as minimal constitutional standards, all of this despite the fact that the issue was not before the court. This gratuitous grant of legal status runs contrary to decisions of this Court. *United States v. Petrillo*, 322 U.S. 1, (1947); *United States v. International Union*, 352 U.S. 567, 590, (1957).

(7) The adoption of H.E.W. Guidelines constitutes a virtual abdication of judicial responsibility in permitting the executive branch of government to set minimal constitutional standards. This not only violates the doctrine of separation of

powers but places the administration of each school on a "Procrustean Couch" tailoring it to, not judicially established constitutional limits, but merely administrative dictates.

(c) The need for uniformity between Circuits speaks eloquently of the necessity for a review of the opinion below. Numerous decisions of other Circuits have found no constitutional impediment to voluntary racial imbalance or even involuntary racial imbalance innocently conceived. *Springfield School Comm. v. Barksdale*, 348 F.2d 261 (First Cir., 1965); *Evans v. Ennis*, 281 F.2d 385 (Third Cir., 1960); *Bradley v. School Board of City of Richmond*, 345 F.2d 310 (Fourth Cir., 1965) reversed on other grounds 382 U.S. 103, 15 L.Ed. 2d 187, 86 S.Ct. 224; *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (Sixth Cir., 1963); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (Seventh Cir., 1963) cert. denied 377 U.S. 924, 12 L.Ed.2d 216, 84 S.Ct. 1733; *Clark v. Board of Education of Little Rock*, 369 F.2d 661 (Eighth Cir., 1966) rehearing denied March 31, 1967; *Downs v. Board of Education of Kansas City*, 336 F.2d 988, (Tenth Cir., 1964) cert. denied 380 U.S. 914.

6. Irreparable injury to your petitioners. The opinions as implemented presently and prospectively by the decree effectively remove the direction, if not the administration of school affairs, from the hands of local officials. Various portions of the decree, unless stayed pending a decision on writs, will cause immediate and irreparable injury. Illustrative of said injury are the following:

(a) Choice periods are fixed arbitrarily, even though in some circumstances the choice has already been exercised and school will not be opened during the entire period. (Decree II, (c))

(b) First class mailing of choice forms places a severe financial burden on the school board despite the fact that other less expensive means are adequate (Decree II, (f))

(c) Elimination of preference for prior attendance will require students to involuntarily engage in a game of musical chairs in order to obtain an education, when applied along with an annual choice plan (Decree II, (1))

(d) The decree determines to a large extent where public funds shall be spent and in some cases what courses shall be taught and to whom they should be taught. (Decree VI, (a)&(b))

(e) Under the decree, schools must be closed under certain circumstances; thus, in effect, expropriating property belonging to the local school boards. (Decree VI, (a))

(f) Proposed schools must be located with the object of elimination of racial imbalance rather than by need, availability, cost of land, student density or other rational educational reasons. Under the present circumstances school boards are in a quandary as to proposed construction and the school systems under these circumstances are suffering (Decree VII)

(g) Contracts for teachers must be voided, if

necessary, in order to achieve a semblance of racial balance of the faculty and staff of the respective school systems (Decree VIII, (a))

It is easy to see that the decree if enforceable immediately would create grat chaos in an area which raises many pertinent constitutional questions. A denial of the stay order will irreparably and immediately injure your petitioners. In addition thereto, District Courts in the State of Louisiana are already applying this decree to other school boards not parties to this action. Accordingly, most of the school boards in the State will be required to comply with this decree before this Honorable Court can determine the constitutional issues raised herein.

WHEREFORE, your petitioners pray that the judgment and mandate of the Court of Appeals for the Fifth Circuit, issued on the 29th day of March, 1967, be stayed and/or suspended pending the timely filing of a petition for writ of certiorari and final determination of the matter by this Court.

Respectfully submitted,

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CERTIFICATE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that copies of the foregoing application have been served on counsel for respondents by placing same in the United States mail at the following addresses with sufficient postage thereto annexed.

VIA AIR MAIL
Hon. John Doar
Assistant Attorney General
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Washington, D. C. 20530

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Mr. Alvin J. Bronstein
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Mr. A. P. Tureaud
1821 Orleans Avenue
New Orleans, Louisiana

New Orleans, Louisiana, this 11th day of April, 1967.

WILLIAM P. SCHULER

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL,

Appellees.

No. 23335

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL.,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL.,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23253

JIMMY ANDREWS, ET AL.,
Appellant,

versus

CITY OF MONROE, LOUISIANA, ET AL.,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING EN BANC

(March 29, 1967.)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, and SIMPSON, Circuit Judges.

PER CURIAM: 1. The Court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion.

2. School desegregation cases involve more than a dispute between certain Negro children and certain

schools. If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

3. The Court holds that boards and officials administering public schools in this circuit[1] have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation[2] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties,

[1] "In the South", as the Civil Rights Commission has pointed out, the Negro "has struggled to get into the neighborhood school. In the North, he is fighting to get out of it." Civ. Rts. Comm. Rep., Freedom to the Free. 207 (1963).

This Court did not "excuse" neighborhood schools in the North and West which have de facto segregation. No case involving that sort of school system was before the Court.

School segregation is "inherently unequal" by any name and wherever located. But de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. In such cases *Shelley v. Kraemer*, 334 U.S. 1 (1948) may turn out to be as important as *Brown*. A broad-brush doctrinaire approach, therefore, that *Brown*'s abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts.

[2] This distinction was first expressed in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion.[3]

4. Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

5. The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and

[3] Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 257 F.2d 73; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery v. Gilmore, 1960, 277 F.2d 364; Boson v. Rippy, 1960, 285 F.2d 43; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

6. In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution. Courts in this circuit should give great weight to future HEW Guidelines, when such guidelines are applicable to this circuit and are within lawful limits. We express no opinion as to the applicability of HEW Guidelines in racially imbalanced situations such as occur in some other circuits where it is contended that state action may be found in state tolerance of de facto segregation or in such action as the drawing of attendance boundaries based on a neighborhood school system.

The Court reaffirms the reversal of the judgments below and the remand of each case for entry of the decree attached to this opinion.

The mandate will issue immediately.

CORRECTED DECREE.

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice

for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice

period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement of distributing the explanatory letter and choice form by first-class

mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards

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for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic,

and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll.

Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended seg-

regated schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faculty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial de-

segregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding that teacher contracts for the 1967-68 or 1968-69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this sub-paragraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:
.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....

Date .....

.....

.....

To be filled in by Superintendent:

School Assigned .....[1]

[1] In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

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GEWIN, Circuit Judge, with whom Judge Bell concurs, DISSENTING:

The opinion of the majority and the proposed decree are long, complicated, somewhat ambiguous and rather confusing. The per curiam opinion of the majority of the en banc court does not substantially clarify, modify or change anything said in the original opinion filed December 29, 1966. Only minor and inconsequential changes were made in the proposed decree.[1] In my view both the opinion and decree constitute an abrupt and unauthorized departure from the mainstream of judicial thought both of this Circuit and a number of other Circuits. I am unable to agree either with the opinion or the decree, especially those provisions dealing with the following: (1) de facto and de jure segregation; (2) the guidelines; (3) the proposed decree; (4) attendance percentages, proportions, and freedom of choice; and (5) enforced integration.

I

De Facto and De-jure Segregation

The thesis of the majority, like Minerva (Athena) of the classic myths,[2] was spawned full-grown and

[1] "The opinion" and "the decree" as used herein refer to the opinion and decree filed in these cases by the three judge panel on December 29, 1966, wherein two of the judges agreed and one dissented. Of necessity, references to page numbers of the opinion refer to the slip opinion.

[2] See Gayley, The Classic Myths, (Rev. ed. 1939) page 23 "She sprang from the brain of Jove, agleam with panoply of war, brandishing a spear and with her battle-cry awakening the echoes of heaven and earth."

full-armed. It has no substantial legal ancestors.[3] We must wait to see what progeny it will produce.

While professing to fashion a remedy under the benevolent canopy of the Federal Constitution, the opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts. Based on such reasoning the Civil Rights Act of 1964 is stripped of its national character, the national policies therein stated are nullified, and in effect, the remedial purposes of the Act are held to apply to approximately one-third of the states of the union and to a much smaller percentage or proportion of the total population of the country. I am unable to believe that the Congress had any such intent. If it did, a serious constitutional question would be presented as to the validity of the entire Act under our concepts of American constitutional government.

The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or in any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because

[3] However, compare the doctrine of the majority and the theme of an article in the Virginia Law Review entitled "Title VI, The Guidelines and School Desegregation in the South", by James R. Dunn. Virginia Law Review, Vol. 53, page 42 (1967). According to footnote 85 of the law review article, the majority opinion was released "as this article was going to press." Mr. Dunn is Legal Adviser, Equal Educational Opportunities Program, United States Office of Education, HEW, Washington, D.C.

they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal protection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

Regardless of our decrees, in spite of our hopes and notwithstanding our disappointments, there is no infallible and certain process of alchemy which will erase decades of history and transmute a distasteful set of circumstances into a utopia of perfection. All who have studied the subject recognize that discriminatory practices did not arise from a single cause. Such practices had their origin and birth in social, economic, educational, legal, geographical and numerous other considerations. These factors tend to be self-perpetuating. We must eradicate them, and I have the faith that they will be eradicated and eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. There is no social antibiotic which will

effect a sudden or overnight cure. It is not possible to specifically fix the blame or to attribute the origin of discriminatory practices to isolated causes, and it is surely inappropriate to undertake to fasten guilt upon any segment of the population. In this area of our nation's history eminent historians still disagree as to causes and effects. Some studies have placed emphasis on the slave trader or the importer of slaves, others have blamed the slave holder, while others have tried to trace the guilt back to tribal chieftans in Africa. Perhaps the most common understanding amongst all the historians and students of the problem is the conclusion that causes cannot be isolated and responsibility cannot be limited to a particular group. Whatever the cause or explanation, it is clear that the responsibility rests on many rather than few.

At this time, almost 13 years after the decisions in *Brown v. Board of Education* (1954) 347 U.S. 483, 98 L.ed. 873 (*Brown I*) and *Brown v. Board of Education* (1955) 349 U.S. 294, 99 L.ed. 1083 (*Brown II*), there should be no doubt in the minds of anyone that compulsory segregation in the public school systems of this nation must be eliminated. Negro children have a personal, present, and unqualified constitutional right to attend the public schools on a racially nondiscriminatory basis.

Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties

which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair . . . Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not

draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964)

* * *

"MR. PASTORE. . . . We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title'. I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Cong. Rec. 7066, April 7, 1964)

In connection with the distinction which the opinion undertakes to make, it is pertinent to observe the following strong and unequivocal pronouncement in the very beginning of the decision in *Brown II:*

"All provisions of *federal, state, or local* law requiring or permitting such discrimination must yield to this principle. There remains

> for consideration the manner in which relief is to be accorded." (Emphasis added) (page 298)

It should be observed that all public school segregation was de jure in the broad sense of that term prior to the first *Brown* decision, in that segregation was permitted, if not required, by law.

It is undoubtedly true that any problem which reaches national proportions is often generated by varying and different customs, mores, laws, habits and manners. Such differences in the causes which contributed to the creation and existence of the problem in the first instance, do not justify the application of a fundamental constitutional principle in one area of the nation and a failure to apply it in another.

While all the authorities recognize the existence and operation of different causes in the historical background of racial segregation, there are also marked similarities. This fact is noted in the recently released study by the United States Commission on Civil Rights, RACIAL ISOLATION IN THE SCHOOLS, 1967, Vol. I (pp. 39, 59-79). In discussing the subject the following observation is made early in the report:

> "Today it [racial isolation or segregation] is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretion-

> ary decisions *familiar in the North*—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding." (Emphasis added)

In its summary the Commission notes that the causes of racial isolation or school segregation are complex and self-perpetuating. It speaks of the *Nation's* metropolitan areas and refers to social and economic factors as well as geographical ones. According to the summary, not only do *state* and *local* governments share the blame, it is categorically asserted that "The *Federal Government* also shares in this responsibility." (Emphasis added) Pertinent similarities in the problem, applicable to the entire nation, are forcefully asserted in the final sentence of the Commission's Summary:

> "*In the North,* where school segregation was not generally compelled by law, these [discriminatory] policies and practices have helped to increase racial separation. *In the South,* where until the Brown decision in 1954 school segregation was required by law, *similar policies and practices* have contributed to its perpetuation." (Emphasis added)

By a process of syllogistic reasoning based on fatally defective major premises the opinion has distorted the meaning of the term segregation and has segmented its meaning into de facto and de jure segregation. All segregation in the South is classified as

de jure[4] while segregation in the North is classified as de facto. Different rules apply to the different types of segregation. The South is heavily condemned. The opinion approaches the problem on a sectional basis and fails to consider the subject except on a sectional or regional basis. There are many references to "the eleven" Southern states and "the seven" border states. This area of the nation is variously characterized as "The eleven states of the Confederacy," "the entire region encompassing the southern and border states", "wearing the badge of slavery", and "arpartheid". Finally, the opinion concludes that the two types of segregation are different, have different origins, create different problems and require different corrective action. It is suggested that there is no present remedy for de facto segregation but that the problems and questions arising from de facto segregation may someday be answered by the Supreme Court.[5]

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[4] At one place in the opinion *pseudo* de facto segregation in the South is mentioned, but it is asserted that any similarity between pseudo de facto segregation in the South and actual de facto segregation in the North is more apparent than real. (p. 68)

[5] The case of Blocker v. Bd. of Educ. of Manhasset, N.Y. (E.D. N.Y. 1964) 226 F. Supp. 208 cited and relied on by the majority does not support the de facto-de jure distinction. In fact Judge Zavatt disavows any such distinction. The following is from the opinion:

> "On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation."
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> "This segregation is attributable to the State. The prohibitions of the Fourteenth Amendment 'have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that ac-

This Court, and the district courts within the six states embraced within our jurisdiction like many other federal courts of the nation have given much time and attention to the solution of the problems arising after the *Brown* decisions. Much has been accomplished, much remains to be done. It is not possible for me to join in the expressions of pessimism contained in the opinion or to approve the insinuations that the courts have failed in the performance of their duty.[6] Even Congress is taken to task for failure to act earlier and for failure to recognize

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tion may be taken. * * *Whoever, by virtue of public position under a State government, * * * takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' Ex Parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676,679 (1880). 'The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.' Cooper v. Aaron, supra, 358 U.S. at 16, 78 S.Ct. at 1408, 3 L.ed.2d 5."

[6] See for example the following statements from the opinion:

"The courts acting alone have failed." (p. 7).

* * *

"Quantatively, the results were meager." (p. 20-21)

* * *

"And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." (p. 24)

* * *

"In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan." (p. 36)

school desegregation "as the law of the land."[7] In the *Brown* cases the Court clearly and wisely recognized the fact that those decisions had changed the law which had been in effect for decades. Due notice was taken of the fact that the new order of the day would "involve a variety of local problems." The court recognized "the complexities arising from the transition to a system of public education freed of racial discrimination." Moreover, the Court stated, "Full implementation of these constitutional principles may require solution of varied local school problems." The courts were instructed to be "guided by equitable principles," to give consideration to "practical flexibility in shaping remedies" and observed that equity courts have a peculiar "facility for adjusting and reconciling public and private needs." The *Brown* decisions emphasized the concept that courts of equity are particularly qualified to shape such remedies as would "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles" pronounced in the first *Brown* decision. Contrary to the tone and expressions of the majority opinion, the Supreme Court early announced the policy of heavy reliance on the district courts and that policy has continued to this date.

[7] See item (5), page 24 of the opinion:
"(5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land."

II

Guidelines

With respect to the guidelines, it should be noted that they were not an issue presented to the District Court. The cases here involved had been tried in the respective district courts, appeals taken to this Court and were pending on the docket of this Court before the 1966 Guidelines were promulgated. Guidelines were not made an issue by the pleadings or otherwise in the district courts and no evidence was taken with respect to them. The issue of the guidelines are before this Court because the Court, sua sponte, brought the issue before it.[8] In my view their validity is not an issue to be decided in this Court. See *United States v. Petrillo* (1947) 332 U.S. 1,5,6; *United States v. International Union* (1957) 352 U.S. 567,590; *Connor v. New York Times* (5 Cir. 1962) 310 F.2d 133, 135; *Gibbs v. Blackwell* (5 Cir. 1965) 354 F.2d 469,471.

In its first approach to the question the Court indicated that it would not pass upon the constitutionality of the guidelines but would give weight to or rely upon them as a matter of judicial policy. When con-

[8] See opinion, page 10, footnote 13.
It should be noted that when the panel which originally heard this case invited briefs no mention was made of any constitutional question or issue with respect to the HEW guidelines. Rather, the questions posed related to whether it was "permissible and desirable" for the court to give weight to or rely on the guidelines; and if so, what practical means or methods should be employed in making use of the guidelines. From the questions raised by the court, counsel could not have gained the impression that the court was to make a full scale determination of the constitutional questions involved.

fronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general application. It was then stated that since they were not a rule, regulation or order, they constitute "a statement of policy", and while HEW "is under no statutory compulsion to issue such statements" it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses "in determining whether a school meets the requirements for eligibility to receive financial assistance." Immediately the opinion recognizes the inherent unfairness and vices of such pronouncements of administrative policy without an evidentiary hearing. "The guidelines have the vices of all administrative policies established unilaterally without a hearing."[9] Finally, the opinion concludes that the guidelines are fully constitutional, recognizing as it is bound to do, that a failure to comply with them cuts the purse strings and closes the treasury to all who fail to comply:

> "The great bulk of the school districts in this circuit have applied for federal financial assistance and therefore operate under voluntary desegregation plans. Approval of these plans by the Office of Education qualifies the schools for federal aid. *In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights*

[9] See opinion page 30.

> *Act of 1964.* Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations." (Emphasis added) (p. 112)

Whether viewed from a substantive or procedural point of view, due process and sound judicial administration require, at the very least, an evidentiary hearing on a matter so vital to so many people.[10] Not only are numerous people affected, but those most affected are the school children of the nation. The most vital segment of our democratic society is our school system. The operation and administration of the public school systems of this nation are essentially a local business. It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion. In the

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[10] The 1966 Guidelines were promulgated on March 7, 1966, after these cases were docketed in this Court. The fact that the appellees had no opportunity to have a hearing and that the guidelines were unilaterally issued without receipt of evidence from the numerous school districts was called to the attention of this Court by one of the briefs for appellees:

> "As pointed out in detail below, the Constitutional and legislative principles applicable to the expenditures of federal funds, the legislative and administrative discretion placing conditions upon the receipt and use thereof, the lack of due process in the adoption thereof and the lack of any opportunity to be heard by those affected thereby all render such Guidelines inapplicable to the pending cases."
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> "The 1966 Guidelines (as well as the 1965 Guidelines) were not approved by the President. They were issued by the Office of Education unilaterally without an opportunity for the representatives of the thousands of school districts affected thereby to be heard. As unilateral directives they have not been subject to judicial review."

See consolidated brief Jefferson County Board of Education, pp. 76-77.

two most recent pronouncements by the Supreme Court dealing with the problem of segregation as related to faculty and staff, that Court refused to act without an evidentiary hearing. In both decisions the cases were remanded to the district court "for evidentiary hearings." *Bradley v. School Bd. of Richmond* (1965) 382 U.S. 103, 15 L.ed.2d 187; *Rogers v. Paul* (1965) 382 U.S. 198, 15 L.ed.2d 265. Similarly, in *Calhoun v. Latimer* (1964) 377 U.S. 263, 12 L.ed.2d 288, the Court had for consideration a desegregation plan of the Atlanta Board of Education. During the argument before the Supreme Court counsel for the Board of Education informed the Court that subsequent to the decision of the lower court, the Board had adopted additional provisions authorizing "free transfers with certain limitations in the city high schools". The petitioners contended that the changes did not meet constitutional standards and asserted that with respect to elementary students the changed plan would not achieve desegregation until sometime in the 1970's. The Supreme Court did not "grasp the nettle" but vacated the order of the lower court and remanded the case to "be appraised by the district court in a *proper evidentiary hearing.*" (Emphasis added)

III

Decree

I now come to a consideration of the decree ordered to be entered and its relation to the opinion. It is impossible to consider the decree and the opinion sep-

arately; they are inextricably interwoven. Neither takes into account "multifarious local difficulties", and therefore, any particular or peculiar local problems are submerged and sacrificed to the apparent determination, evident on the face of both the opinion and the decree, to achieve percentage enrollments which will reflect the kind of racial balance the opinion seeks to achieve.

The opinion asserts that uniformity must be achieved forthwith in everyone of the six states embraced within the Fifth Circuit. No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since *Brown II*. As the Court there stated:

> "Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems*, we required further *argument* on the question of relief." (p. 298) (Emphasis added)

See also *Davis v. Bd. of Comm. of Mobile Co., Ala.*, 322 F.2d 356 (5 Cir. 1963) wherein this Court made a distinction in the rural and urban schools of Mobile County, Alabama. We held:

> "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963."

The effectiveness of the district courts has been seriously impaired, in a real sense, contrary to the teachings of all the decisions of the Supreme Court since *Brown II*. Under the opinion and decree a United States District Judge serves essentially as a referee, master, or hearing examiner. Now his only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree, to supervise compliance with its detailed provisions as therein ordered and directed, and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment.

Such a detailed decree on the appellate level not only violates sound concepts of judicial administration, but it violates a longstanding philosophy of the federal judicial system, and indeed all judicial systems common to this country, which vest wide dis-

cretion and authority in trial courts because of their closeness to and familiarity with local problems. See the opinions in *Brown II*, *Bradley*, *Rogers*, and *Calhoun*. For example, in *Brown II* the Court stated:

> "Full implementation of these constitutional principles may require solution of *varied local school* problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of *their proximity to local conditions* and the possible need for further hearings, *the courts which originally heard these cases can best perform this judicial appraisal.* Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been *characterized by a practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of *these traditional attributes of equity power*. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to

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school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Emphasis added)

The opinion asserts that "most judges" do not possess the necessary competence to deal with the questions presented, and do not "know the rights questions, much less the right answers." Notwithstanding the foregoing assertion, the judges of the majority, acting on the appellate level, proceed to fashion a decree of such minute detail and specificity as to remove all discretion and authority from the district judges on whom the Supreme Court has relied so heavily. In my view the district judges are in much better position to know the questions and the answers than appellate judges who necessarily function some distance away from an evidentiary hearing and are removed from the "multifarious local problems" and "the variety of obstacles" inherent in the solution of the issues presented.

IV

Percentages, Proportions and Freedom of Choice

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried, and unharried right to choose where a student will attend public school subject only to administrative considerations which do not take into account or are not related to considerations of race. If there is a free choice, free in every sense of the word, exercised by students or by their parents, or by both, depending on the circumstances, in accordance with a plan fairly and justly

administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear. *Goss v. Board of Education*, 373 U.S. 683 (1963); *Bradley v. School Board*, 345 F.2d 310,318 (4 Cir. 1965), vacated and remanded on other grounds, 382 U.S. 108 (1965 per curiam). See also *Clark v. Board of Educ. of Little Rock*, 369 F.2d 661 (8 Cir. 1966); *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55,59 (6 Cir. 1966); *Lee, et al. v. Macon County Board of Education, et al.* (D.C. M.D. Ala. 1967) C.A. 604-E, ... F. Supp. ..... If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this Court is without authority under the Constitution or any enactment of Congress to compel them to make a change. Implicit in freedom of choice is the right to choose to remain in a particular school, perhaps the school heretofore attended. That in itself is the exercise of a free choice. The fact that Negro children may not choose to leave their associates, friends, or members of their families to attend a school where those associates are eliminated does not mean that freedom of choice does not work or is not effectively afforded. The assertion by the majority that "the only school desegregation plan that meets Constitutional standards is one that works" as interpreted by that opinion, simply means that students and parents will not be given a free choice if the results envisioned by the majority are not actually achieved. There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compul-

sion. If the percentage of Negro and white children attending a particular school does not conform to the percentage of Negro and white school population prevalent in the community, the majority concludes that the plan of desegregation does not work. Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law.

The aim and attitude of the majority is reflected by the following statement:

> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools."

Further the Court equates the percentage attendance test with percentages in jury exclusion[11] cases and

[11] One of the leading and most recent cases on jury exclusion is Swain v. Alabama (1965) 380 U.S. 202, 13 L.ed.2d 759. With respect to proportional representation on juries the Court concluded:

> "Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion

voter registration cases. It should be pointed out that such cases had no element of free choice in them, and therefore, the comparison is inapposite. In the instant cases the majority condemns a free choice plan unless it achieves the percentage result which suits the majority. Accordingly, the opinion concludes:

> "Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system."

There is no constitutional requirement of proportional representation in the schools according to race.

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of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which the petit jurors are drawn." (p. 208)

Further, the Court in *Swain* quoted with approval the following statement from Cassell v. Texas, 339 U.S. 282, 286-287, 94 L.ed. 839, 847:

"Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible."

Furthermore, since there can be no exclusion based on race, proportional limitation is likewise impermissible under the Constitution.

We should be concerned with the elimination of discrimination on account of race, and freedom of choice is one means of accomplishing that goal. It is not our function to condemn the children or the school authorities because the free choices actually made do not comport with our own notions of what the choices should have been. When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace. Our duty in seeking to eliminate racial discrimination is to vouchsafe to all children, regardless of race, a full, complete and timely free choice of schools in appropriate cases in keeping with sound administrative practices which take into consideration proper criteria. Both proportional representation and proportional limitation are equally unconstitutional.

V

Enforced Integration

The opinion seeks to find a Congressional mandate requiring compulsory or enforced integration in the public schools as distinguished from the elimination of segregation. Throughout the opinion there appear

a tangled conglomeration of words and phrases of various shades of meaning, all of which are equated with each other to reach the conclusion desired by the majority that school boards in this Circuit must adopt and implement a plan of forced integration.

It seems appropriate to return to the Civil Rights Act of 1964 and the legislative history which spawned its enactment in order to ascertain the true Congressional intent. Section 401(b), 42 U.S.C.A. § 2000c(b) defines desegregation in unequivocal terms:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407(a)(2) of Title IV, Title 42 § 2000c-6(a)(2) provides as follows:

> ". . .provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such *racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.*" (Emphasis added)

It should be noted that the portion of the language of the proviso which is underscored is omitted in the court's opinion. As to enforced integration the following statement by Senator Humphrey is exactly in point:

> "Mr. Humphrey. . .I should like to make one further reference to the *Gary* case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration. . .The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools. . .The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (110 Congressional Record 12717)

Likewise with respect to Section 407(a)(2) Senator Humphrey's statement clarifies and makes plain the Congressional intent by referring to the *Gary* case.[12]

The following additional excerpts from the legislative history serve to clarify the intent of Congress. Congressman Celler, Chairman of the Judiciary Committee of the House and Floor Manager of the bill:

> "There is no authorization for either the Attorney General or the Commissioner of Edu-

[12] Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (1963).

cation to work toward achieving racial balance in given schools." (110 Congressional Record 1519, January 31, 1964)

Senators Byrd and Humphrey:

> "MR. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education, under section 602 or Title VI, from establishing a requirement that school boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?
>
> "MR. HUMPHREY. Yes, I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the Act." (110 Congressional Record, Page 12715, June 4, 1964).

Senator Javits:

> "MR. JAVITS. . .Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or

regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under Section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative." (110 Congressional Record, Page 12717, June 4, 1964).

Senators Byrd and Humphrey:

"MR. BYRD of West Virginia. . .Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?

MR. HUMPHREY. Let me read from the substitute: Provided, that nothing herein shall empower any official or court of the United States to issue any order.

MR. BYRD of West Virginia. 'To issue any order', but does it provide that the Office of Education shall not cut off Federal assistance?

MR. HUMPHREY. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read Section 602.

MR. BYRD of West Virginia. The words are: No such rule, regulation, or order shall become effective unless and until approved by the President.

MR. HUMPHREY. That is correct.

MR. BYRD of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?

MR. HUMPHREY. Because I do not believe the President will violate the law." (110 Congressional Record, Page 12715, June 4, 1964).

In order to escape the clear meaning of the quoted statutes and the unquestioned intent of Congress as illustrated by the legislative history, the opinion summarily obliterates any distinction between desegregation and integration. Within the context of the opinion integration means forced or enforced integration. Again the term integration is applied only to *de jure* segregated schools. An analysis of the opinion demon-

strates that the process of reasoning used amounts to an unauthorized insertion of the word "de jure" to achieve and maintain the de facto and de jure distinction with which I dealt earlier. By means of this device the opinion converts the Civil Rights Act of 1964 into a new and different concept entirely foreign to its true meaning. I quote several typical excerpts from the opinion:

> "We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." (Emphasis added) (footnote 5, page 6)
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> * * *
>
> *"The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary nonracial systems—with or without federal funds."* (Emphasis in orig.) (page 14)
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> * * *
>
> "Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and *quoted these two opinions* they did so within the context of the problem of *de facto segregation.*" (Emphasis added) (Page 39) [The two cases mentioned are *Briggs* and *Bell.*]
>
> * * *

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation *in de jure segregated schools.*" (Emphasis added) (page 74)
>
> * * *
>
> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana *de facto type of segregation.*" (Emphasis added) (page 80)

Again it should be said that it is not easy to understand the reasoning by which the majority concludes that the Federal Constitution requires integration of formerly *de jure* school systems but does not require the integration of de facto systems. Apparently faced with this dilemma the majority realized that it must challenge the jurisprudence established by *Briggs v. Elliott* (E.D. S.C. 1955) 132 F. Supp. 776, and *Bell v. School City of Gary* (N.D. Ind. 1963) 213 F. Supp. 819, affirmed 324 F.2d 209 (7 Cir. 1963). The opinion refers to these cases as "two glosses on Brown". The repeated assertions of Senators showing their reliance upon the two decisions in question give emphasis to the meaning of the teaching of those two cases. Senator Humphrey actually stated that the thrust of Judge Beamer's opinion in the *Gary* case was incorporated into the Civil Rights Act of 1964.[18] The majority disposes of Senator Humphrey's comment and the *Gary* case by asserting that the school

[18] See opinion page 81.

districts were drawn without regard to race. The following is from the opinion:

> "Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation." (opinion page 80)

While it may be true that the facts in *Gary* showed good faith on the part of the school board, it is likewise true that the Gary school system involved de jure segregation within the meaning of the majority opinion. We quote from Judge Beamer's opinion, 213 F. Supp. at 822:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same campus, one was called Pulaski-East and the other Pulaski-West. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law, (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28-5104)"

The difficulty of the majority is further increased by virtue of the fact that Judge Beamer cited cases which uphold the *Briggs* doctrine. More important, when the case was affirmed by the Court of Appeals of the Seventh Circuit, the so-called *Briggs* dictum

was cited as authority for the court's holding, 324 F.2d at 213.

If the alleged *Briggs* dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in *Briggs* was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court,[14] for so long by such a clear, understandable, direct and concise holding as the language in *Briggs* which the opinion now condemns. The language is straightforward and simple: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

It is interesting also to observe that the Supreme Court has never disturbed the *Briggs* language, although it has had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so. In the case of *Shuttlesworth v. Birmingham* (N.D. Ala. 1958) 162 F. Supp. 372,378, the district court speaking through Judge Rives quoted the *Briggs* opinion. The Supreme Court affirmed the judgment. *Shuttlesworth v. Birmingham*, 358 U.S. 101.

The majority rule requiring compulsory integration is new and novel, and it has not been accepted

[14] See the very clear dissenting opinion of Judge Cox.

by the Supreme Court or by the other Circuits. The rationale of *Briggs* has been approved. *Brown* decisions, *supra; Goss v. Bd. of Educ. of Knoxville, supra; Bolling v. Sharpe,* 347 U.S. 497,498; *Pennsylvania v. Board of Trusts,* 353 U.S. 230,231; *Cooper v. Aaron,* 358 U.S. 1 (passim); *Scull v. Virginia,* 359 U.S. 344,346; *Wolfe v. North Carolina,* 364 U.S. 177,182; *Gomillion v. Lightfoot,* 364 U.S. 339,349; *Garner v. Louisiana,* 368 U.S. 157,178; *Turner v. City of Memphis,* 369 U.S. 350,353; *Johnson v. Virginia,* 373 U.S. 61,62; *Wright v. Rockefeller,* 376 U.S. 52, 57-58; *Springfield v. Barksdale* (1 Cir. 1965) 348 F.2d 261; *Bradley v. School Board of Richmond, Va.* (4 Cir. 1965) 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Educ.* (4 Cir. 1966) 369 F.2d 29; *Deal v. Cincinnati Board of Educ.* (6 Cir. 1966) 369 F.2d 55; *Bell v. School City of Gary, Indiana* (7 Cir. 1963) 324 F.2d 209; *Clark v. Board of Educ. of Little Rock* (8 Cir. 1966) 366 F.2d 661; *Downs v. Board of Educ. of Kansas City* (10 Cir. 1964) 336 F.2d 988, cert. den., 380 U.S. 914.

Conclusion

It is my judgment that the de facto-de jure distinction created in the opinion can not be supported as a matter of law. Percentage or proportional enrollment requirements based on race, and enforced integration are in violation of well established constitutional concepts in my opinion.

While it cannot be denied there has been recalcitrance and resistance to desegregation as required

by the *Brown* decisions in numerous areas, I cannot share in the pessimism expressed in the opinion. Throughout the country a substantial effort has been made to eliminate segregation and substantial progress has been made. The *Brown* decisions contemplated some difficulties and complexities. A review of the history of the difficulties involved strongly indicate that the greatest problems arise when a start or "break through" is initiated. Recalcitrance and resistance which appeared initially in many areas have now subsided or disappeared. It is also true that the emphasis has shifted properly from "deliberate" to "speed". I continue to have confidence in the local school boards of the nation. While some of them have performed slowly and a few have not performed at all, the vast majority of school boards are composed of conscientious, civic minded, sincere people who are undertaking to do what is best for the school children of the nation. We should not interfere with them unduly.

Furthermore, I continue to have confidence in the judicial system of the country and hold the firm belief that the record of the courts in achieving compliance with the *Brown* decisions demonstrates that the courts have given their prompt, careful and diligent attention to the problems as they have arisen. In my view the heaviest burden has been on the district courts, and inevitably the best solutions will come at the district court level where the judges are in close contact with local complexities, obstacles and problems. The primary responsibility should be left where the *Brown* decisions placed it, with the boards of education under the supervision and guid-

ance of the district courts. This is not to say that the courts should not accord full consideration to the expertise of the Department of Health, Education and Welfare; and we should give due consideration to HEW Guidelines when it is appropriate to do so. However, the provisions of the Civil Rights Act of 1964 should not be by-passed. Rules, regulations and orders of general application should be enacted in accordance with the requirements of due process and school systems should not be penalized by such rules, regulations or orders which are not approved by the President as provided by the Act. It is no answer to say that the guidelines are interpretive regulations or "housekeeping" rules. They are being used and applied as general rules, regulations or orders.

Due to developments in the jurisprudence, particularly with respect to desegregation of faculty and staff, the orders of the district courts should be vacated and the causes remanded for further consideration and for evidentiary hearings in the district courts. In effect the appellees recognize the fact that this must be done. We should not reverse the district courts on questions which were not issues before them and fashion our own decree with respect to such issues without any evidentiary basis or without affording an opportunity for the presentation of evidence relating to such issues in the district courts.

Judge BELL, with whom Judge GEWIN joins, DISSENTING:

I respectfully dissent. The two-judge or original opinion of December 20, 1966 is what the majority has

adopted. That opinion seriously erodes the doctrine of separation of powers as between the Executive and the Judiciary. Moreover, much of its language is in the nature of overreach and, as such, adds confusion and unrest to the already troubled area of school desegregation. The overtones of compulsory integration and school racial balances in the original opinion can only chill the efforts of school administrators to complete the task of eliminating dual school systems of the South. In addition, the other side of some of the more important holdings of the majority opinion should be considered and those propositions stated which militate against their validity.

The plain intent of the two opinions is to establish a uniform law for the school systems of this circuit. Thus, the opinions must be tested as laws. Their validity and efficacy as laws should be considered in the frame of reference of need, fairness, clarity and what is constitutionally permissible.

It is fundamental in law making that laws should be fair as between people and sections. The requirement that laws be clear in meaning is also a fundamental. We cannot be expected to obey the law if we cannot understand it. Caligula kept the meaning of the laws from the Romans by posting them in narrow places and in small print[1]—it is no different today when the law is couched in vagueness.

[1] Suetonius, The Lives of the Twelve Caesars, (Random House, 1959), p. 191, 192.

Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. Our experiments with sumptuary-like laws are exemplified by the *Dred Scott* decision, 19 How. 393, Reconstruction, and the prohibition laws. All failed.

The majority opinions, considered together, fail to meet the tests of fairness and clarity. The advance approval given to a requirement of compelled integration exceeds what is constitutionally permissible under the Fourteenth Amendment. They cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.

It is important, however, that this dissenting opinion not mislead any person having responsibility in the area of school desegregation. The dual system of education must be eliminated. This was ordered in 1955. *Brown v. Board of Education of Topeka*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. School boards were told to convert the dual segregated school systems into racially nondiscriminatory school systems. The court pointed to problems that might arise in the transition with respect to the physical condition of school plants, transportation, personnel, and in the revision of school districts and

attendance areas into compact areas. This order followed reargument of the question of remedy after the 1954 decision holding segregated education under the separate but equal doctrine unlawful. *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. After full argument, the transition was ordered. The separate but equal doctrine was already lost and the time for remedy was at hand. Transition was the remedy provided.

Transition to date has in the main consisted of following a freedom of choice plan for pupil assignment. But freedom of choice without faculty desegregation and the elimination of discrimination in buildings, equipment, services and curriculum will not suffice to convert a dual system into a unitary nondiscriminatory system. The slow progress to date toward eliminating dual systems is what has brought about the majority opinions, and is also at the root of the disturbance between the Health, Education, and Welfare Department and many school boards. The objective must be, as the Department of Justice contends, that there be no white schools—no Negro schools—just schools. But this is all that is required and it can be accomplished without the open-end compulsory integration language of the majority opinions, or the geometric progression guidelines[2] of HEW which the majority opinion approves.

[2] Even while these cases were pending after en banc argument, HEW announced new guidelines. Now for a school system to receive approval without further investigation, it must show that the number of minority group students in integrated schools within the system in the school

The mandate of the Supreme Court in *Brown II* can be carried out by the assignment of faculty and students without regard to race, and by affording equality in educational opportunity from the standpoint of buildings, equipment, and curriculum. Where freedom of choice in student assignment is ineffective to the extent that a dual system continues, it can be implemented by a neighborhood assignment plan. Assignments should then be made by the school board to the school nearest the home of the student, whether formerly white or Negro. Then the child would be given the option under a freedom of choice plan of attending another school with priority to attend being based on proximity of residence to school. This method of student assignment is comparable to what is being used in Charlotte. *Cf. Swann v. Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29 (En banc).

We should order the school boards in these cases, which they and the entire court agree must be reversed, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions. School boards and the public would understand the objective—to convert dual school systems into unitary nondiscriminatory systems just as the Supreme Court directed twelve years ago. School boards and the public would also understand the method to be followed in the conversion. But this approach is too simple for the majority. Their view is that something

year 1967-68 will be double the number present in 1966-67 and in some instances triple the number. New Orleans Times-Picayune, March 16, 1967, page 1, Column 4, Associated Press.

more is required—a result which brings about substantial integration of students. The mandatory assignment of students based on race is the method selected to achieve this result. This is a new and drastic doctrine. It is a new dimension in constitutional law and in race relations. It is new fuel in a field where the old fire has not been brought under control.

PROCEDURAL DUE PROCESS AND THE APPROVAL OF THE GUIDELINES

The scope of the majority holding as to the binding force on the federal courts of the HEW guidelines in the area of school desegregation posed a serious separation of powers question. That fact alone should have indicated that the validity of the HEW guidelines was of primary concern. One of the major premises of the original or panel opinion is that HEW excuses those school systems which are under court order from compliance with its guidelines; hence, the necessity of the court setting the guidelines as minimum standards to prevent the courts from being used as an escape route. The original HEW Regulation promulgated in 1964 makes this possible. Title 45A, CFR, § 80.4(c). The HEW statement of policy of 1965, Title 45, CFR, § 181.4, receded from this position but the latest HEW policy supersedes the 1965 statement which includes § 181.4, *supra*. See HEW March and December 1966 Statements—not reported in CFR.

The HEW Statements of Policies for School Desegregation are referred to generally in the school de-

segregation world as guidelines. At least three such statements have been issued; one in 1965, one in March 1966, and another in December 1966. There apparently have been amendments. Footnote 2, *supra*. No guidelines whatever were in issue in the lower courts.[a] The guidelines of March 1966 had not been promulgated when the cases were there. Indeed the guidelines of December 1966 had not been promulgated when the cases were submitted after argument to the original panel of this court. The fact that they had not been in issue did not deter the court in the original opinion. There it was held that the ". . . HEW guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964". This perhaps meant all guidelines promulgated up to the date of the opinion, December 29, 1966. Any doubt as to the inclusion of the December 1966 guidelines was resolved when the majority in the en banc per curiam opinion stated that the 1965 and 1966 HEW guidelines are within the decisions of this court and comply with the letter and spirit of the Civil Rights Act of 1964 and meet the requirements of the United States Constitution. This is adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking

[a] The practice of hearing appeals in school cases on old records is very unsatisfactory. We do not know what changes in desegregation plans may have been made in the interim. It is a rapidly changing public area where plans as well as the law are in flux. Cf. *Calhoun v. Latimer*, 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, where the court took note of a supervening plan and remanded for an evidentiary hearing in the District Court.

departure from even rudimentary due process.[4] Approval of future guidelines is limited by the majority to those ". . . within lawful limits."

The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion. Courts are restricted to acting within the limits of the Fourteenth Amendment in the school desegregation area. It may or may not be proper for a court to act within the limits of what the HEW policy may be in allocating federal school funds. Sometimes there may be a difference. A decent respect for the judiciary dictates that we make this plain.

[4] Section 602 of Title IV of the Civil Rights Act of 1964, 42 USCA, § 2000d-1 provides that no rule, regulation or order of HEW shall become effective unless and until approved by the President. Whether the guidelines are such rules or regulations cannot be decided without an evidentiary hearing concerning their meaning through application. This question has never been put in issue in these cases.

THE STANDARD REQUIRED BY THE MAJORITY IS UNCONSTITUTIONALLY VAGUE

The original opinion states in two places that the only satisfactory plan for desegregating a school system is one that works. One looks in vain for a definition of "one that works". This is manifestly a vague standard. It cannot be followed. Moreover, it is subject to selective enforcement and a statute couched in such language would be patently unconstitutional.

In another place in the original opinion the statement is made that substantial integration must be achieved in disestablishing dual school systems. This is not clear. What is substantial? Is the reference simply to a system, or to each school, or to each class room?

The en banc per curiam opinion may have attempted to improve the standard by saying that the criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing the objective of educational opportunities on equal terms to all. Who knows the meaning of this? There is no mention of result.

These vague standards are perhaps the most mischievous parts of the majority opinions. They place unfettered discretion in HEW in the area of school desegregation. No school board will ever know when it has performed its duty to eliminate the dual school system. No school board will ever know whether federal funds will be made available. This type of standard

places school systems under men and not laws. School boards and school patrons are entitled to a clear and definite standard. The problem of desegregation will not be solved absent a clear standard.

THE DE JURE-DE FACTO DOCTRINE IS INFAIR

The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.[5]

This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written

[5] The legislative history of the Civil Rights Act of 1964 does not show that Congress acted on a de jure-de facto basis. I would not attribute such a form of sectionalism to the Congress.

out of the law with respect to the de jure states by using the de jure-de facto theory. Title IV, §§ 401(b), 407(a), 42 USCA, §§ 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other.

The de jure-de facto doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise to punitive treatment of those states employing what was then a legal system. The Supreme Court has never so indicated. Moreover, the Supreme Court holding in *Brown* was based on the finding that segregated education was unequal. How can it be unequal in one section of the country and not another? Does *Brown* interdict only segregation imposed affirmatively by law, or does its rationale also include the state action of holding to neighborhood assignments thereby perpetuating de facto segregation? The majority decision limits the rationale to the southern and border states type of segregation formerly imposed affirmatively by law. In such event compelled integration may be required in the de jure

states but the logic of reaching this point, because of the restrictions in the 1964 Act to the contrary, excuses the de facto states from the Act and the Constitution.

The real answer is that no such new doctrine or theory is necessary. The schools of the South and border states must do what the Supreme Court has ordered—convert dual school systems into unitary nondiscriminatory school systems. The constitutional power already exists in the courts to see that this is done. This newly discovered source of power tends only to disturb settled doctrine. Its purpose can only be to require racial balances in the de jure states.

THE BRIGGS DICTUM

It is a settled constitutional principle that the Fourteenth Amendment does not require compulsory integration but only proscribes segregation. It is the state action segregation which violates the equal protection clause. We have so stated in the following cases: *Avery v. Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders v. Rippy*, 1957, 247 F.2d 268; *Rippy v. Borders*, 1957, 257 F.2d 73; *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery v. Gilmore*, 1960, 277 F.2d 364; *Boson v. Rippy*, 1960, 285 F.2d 43; *Stell v. Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers v. Jackson*, 1964, 328 F.2d 408; *Lockett v. Board of Education of Muscogee County*, 1965, 342 F.2d 225.

This principle is euphoneously referred to in the original two-judge opinion as the *Briggs* dictum. It was stated in *Briggs v. Elliott*, E.D.S.C., 1955, 132 F. Supp. 776, but no court, until now, has ever held the Fourteenth Amendment to mean otherwise. The Amendment is entirely negative in character. The original panel, as a part of its two-pronged approach to compulsory integration, overruled this principle *sub silentio*.

The court, sitting en banc, could overrule this settled principle and the majority has now done so to an unknown extent in paragraph 3 of the per curiam opinion. We will not know the extent until the question of racial percentages is squarely presented. Here, as I understand the per curiam opinion, the question is tangential except as it relates to converting to a unitary school system. In the first sentence of paragraph 3 the majority holds that school boards have the affirmative duty under the Fourteenth Amendment to bring about a unitary school system in which there are no Negro or white schools—just schools. We can all agree on this statement. The opinion does away with any distinction between the terms "integration" and "segregation" in the field of school desegregation law insofar as the distinction interferes with the affirmative duty to bring about unitary school systems. We can all agree on this. It is then said that in fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all white schools but that such opportunity must be coupled with the integra-

tion of faculty, facilities, and activities. Then, without more, the decisions of this court setting out this principle are overruled to the extent that they conflict with the view of the majority. I am left in doubt as to whether this is a retrenchment from the panel decision. Time will tell.

It may be added that if the court is overruling this settled constitutional principle, it brings this circuit into conflict with the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. *Springfield v. Barksdale*, 1 Cir., 1965, 348 F.2d 261; *Bradley v. School Board of Richmond, Virginia*, 4 Cir., 1965, 345 F.2d 310; *Swann v. Charlotte-Mecklenburg Board of Education*, 4 Cir., 1966, 369 F.2d 29; *Deal v. Cincinnati Board of Education*, 6 Cir., 1966, 369 F.2d 55; *Bell v. School, City of Gary, Indiana*, 7 Cir., 1963, 324 F.2d 209, cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; *Clark v. Board of Education of Little Rock*, 8 Cir., 1966, 366 F.2d 661; and *Downs v. Board of Education of Kansas City*, 10 Cir., 1964, 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. The case of *Taylor v. Board of Education of New Rochelle*, 2 Cir., 1961, 294 F.2d 35 is not to the contrary. There the remedy fashioned was freedom of choice imposed on neighborhood assignments. The case of *Board of Education of Oklahoma City v. Dowell*, 10 Cir., 1967, ... F. 2d ...., [slip opinion dated January 23, 1967], does not appear to be to the contrary. The court distinguished *Downs* by pointing out that *Dowell* involved a finding of bad faith on the part of the school board in carrying out the original order of the District Court to disestablish the dual school system.

It is hard to know just what the court has held as between the panel decision and the en banc per curiam decision. The labored effort to establish the de jure-de facto concept and to overrule this constitutional principle hardly seems calculated as an exercise in semantics. It is more in the nature of judicial lagniappe for use on another day. We will know the full import of the opinions when a motion is presented to assign children on the basis of race so as to comply with what each particular movant may deem to be, in his view, a desirable racial composition for the particular school or schools. This leaves the law in a very unsatisfactory state and portends of utter confusion for school boards.[6]

[6] A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia school system. See *Turner v. Goolsby*, S.D. Ga., 1965, 255 F.Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967 indicate that there are now 527 Negro students enrolled in the Taliaferro County school system and no white students. This result raises serious questions. How is a "plan that works" to be formulated for this school system? What number of white students will be needed to make it work? Where will they come from? How will they be selected? Will a lottery system be used? Will they be compelled to attend the Taliaferro County school system? If so, how? Will the taxpayers of the system be compelled to pay for educating children brought in from outside the system? Will the court ignore system lines although the laws of Georgia provide for separate school systems? What measures will be employed to avoid resegregation through families removing their residences from the school system? Granted this is an extreme example but it is nevertheless a factual situation.

THE DECREE

The use of a uniform decree, as the majority points out, is not novel. Our school desegregation decisions have tended toward uniformity in the freedom of choice method of assignment and in the administration of such plans. A uniform decree within the limits of minimum standards would aid school boards and the district courts but the uniform decree entered in this case can be faulted because of its detail. This comes about through the unbounded aim of the court to track the HEW guidelines. It must be remembered that decrees may have to be enforced by the court and a court should guard against being put in the unfeasible position of having to hear motions based on the alleged breach of some minor and insubstantial provision of its decree. It is also not clear to me that sufficient latitude is left to the district courts to adjust such practical difficulties as may arise under the detail of the decree.

HEW has an advantage over the district courts, as the court has now restricted them, in the execution of school desegregation plans. HEW may delay, excuse, and change. HEW may vary its requirements as between systems. The majority has left no such power in the district courts. They are admonished to follow HEW but it is a sad day for the district courts, and for the entire judiciary as well as for the principle of separation of powers when the only discretion left them is within the limits to be set by HEW.

It also would appear improper to constitute the courts as overlords of the school systems of this circuit to the extent done in the uniform decree. The district courts must require school equalization to the extent set out in paragraph VI of the decree. Its scope is only a short step from taking over curriculum. The building improvement provision moves the courts in the direction of levying local taxes. Ordering school boards to discontinue the use of buildings could amount to taking property without due process and just compensation. These are drastic measures and there are no facts before the court to demonstrate the necessity for them. It is entirely proper for the District Court to disapprove new construction where it will perpetuate the dual school system but this is a matter for complaint and hearing rather than for advance supervision as is required under § VII of the decree.

By way of summation, I reiterate that the majority opinions are unfair to the extent that they discover or establish and then rely upon the de jure-de facto divisive sectional theory. The opinions expand, without constitutional authority, the requirement that dual school systems be converted into something more than unitary school systems: to-wit, that substantial integration be achieved in the respective school systems. This added requirement is itself impermissibly vague as a standard without further delineation. The opinions unduly restrict personal liberty to the extent that compelled integration is approved or re-

quired, and in this regard improperly overturn and expand the settled meaning of the Fourteenth Amendment. The court errs in prematurely holding that the guidelines issued by HEW are constitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. Some of those approved had not been written.

My own view is that the law makes no such requirement as the majority of the court imposes. No such radical departure is necessary to accomplish what the Supreme Court has directed the lower courts to accomplish—the elimination of the dual school system. The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to "stick to our last" so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal. My view, however, is now lost in this court; hence this DISSENT.

COLEMAN, Circuit Judge. SEPARATE OPINION.

These cases remind me of what Mr. Chief Justice Chase said in *Texas v. White*:[1]

> "We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone."

This Court, exercising only such appellate jurisdiction as Congress has seen fit to confer upon it, confronted solely by a question of how best to preserve an already settled Constitutional right, should be guided *by the Constitution alone and by nothing else.*

No one denies that to an incalculable degree the future of this Country depends inescapably upon the continued, constantly improved education of *all its inhabitants.* Nor can it very successfully be denied that the best practical hope of attaining this objective is to be found and maintained in the public schools. It became plain over a hundred years ago that private schools did not and could not reach the masses of the people.

Compulsory discrimination in the public schools, founded on race or color, is Constitutionally dead. No

[1] 74 U.S. 700,720; 7 Wall 700; 19 L. Ed. 227 (1868).

Judge would dispute this. Existentially it is like the wounded animal which bounds on for awhile after it has been fatally shot. The critical problem now is that we must not wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation. Thoroughly realizing this, the Supreme Court left the details of the eradication to the sound judicial discretion of the District Courts, subject only to appellate review. To this day this assignment has not been changed. I do not suppose in our form of government that it could be changed. Courts alone make binding adjudications on questions of Constitutionality, and litigation must begin at the District level.

The public schools of the Nation, not just those of a particular section, are now caught up at the second battleground, legal and political, not about the death of unlawful discrimination but about who and how many of any particular race shall go to any particular school with how many members of some other race. If one looked only at the great volume of litigation and its accompanying strife and publicity he would jump to the conclusion that nothing matters but the racial composition of any educational facility. This is pursued regardless of the real preferences, exercised in genuine freedom, of those directly involved, that is, those who must have an education. In the ultimate this could become a great tragedy for those most affected. An educational house divided against itself may have trouble standing. It certainly cannot operate with maximum effectiveness.

In the light of these considerations, as one who was able to secure an education solely because there was a public school in which there was an opportunity to obtain it, I shall now express my views, as one Judge of this Court, individually, as to the decision now about to be rendered.

In doing so, I proceed upon the thesis that there is nothing at all inconsistent about being, at the same time, both a loyal American and a Southerner. I think Andrew Jackson conclusively settled that point over a century ago.

It is particularly unfortunate if our decision in these cases is in any way to be grounded on old scores against the States of this Circuit. This is contrary to American legal tradition; it opens old wounds, rekindles old fires, and lends itself as a weapon to the futile cause of further intransigency. Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. One is not to be punished or harassed for an act which was lawful when it was done. Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. We are now concerned with rectifying the errors of the present and forestalling, if we can, the anticipated errors of the future. I decline to participate in any ex post facto condemnations. I pre-

fer to believe that this Court is not deliberately doing so.

I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution. I agree with the action of the majority opinion in disclaiming any intention of passing on the validity of educational operations in other Circuits. That matter is not and cannot be before us.

It is out of regard for the desirability of Constitutional uniformity that I agree, in principle, with the attempt to formulate a decree for the future guidance of District Courts in this Circuit. It is obvious that such a decree cannot adjudicate cases in advance of a hearing in the District Court, nor can it be applied in the absence of factual justification.

The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.

Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by

arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention. The District Courts are left free to consider all the evidence, including racial attendance percentages, in determining whether the children of any particular school district have been offered a reality instead of a shadow. It is to be anticipated that the bridge will later have to be crossed when we come face to face with a situation wherein there can be no doubt of the freedom but the results are displeasing and are attacked solely for that reason.

I think it all boils down to this. We once had the doctrine of separate but equal. We did not, I am sorry to say, pay much attention to the "equal". We now have freedom of choice. As Judge Bell so splendidly states it, we are now going to have to make certain of the "freedom". To fail in this is to invite other action which at this time I regard as unconstitutional but which could soon be made Constitutional.

The decree is not as I would have written it had I been charged with sole responsibility for the effort. No offense is intended when I doubt that it is perfect. For example, the *en banc* opinion says that "boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system". Yet II (o) of the decree prohibits any official from influencing parents or students in

the exercise of a choice. In other words, if the officials feel that Negro children should be encouraged to apply for admission to a formerly white school they are prohibited from doing so. They are to be condemned, on appearances, if no Negro child chooses to attend a formerly white school; they are not allowed, in the exercise of ordinary freedom of speech, to discuss the matter with Negro children with a view to their exercising a preference in favor of attending a school they have not formerly attended. The school official cannot win. In one breath he is told to act; in the next he is immobilized.

Experience will hone away these inconsistencies and impossibilities. This Court has drafted uniform decrees on prior occasions. These are now speedily outmoded, if not abandoned. Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.

Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court.

The focal point of the whole matter is the action of the *en banc* opinion repudiating *Briggs v. Elliott* and over-ruling our prior opinions which followed the same rationale, see Footnotes 1 and 2 for the citations.

It is my view that these prior cases were correctly decided. Other Circuit Courts in this Country appear

to feel likewise. If the reasoning in these over-ruled cases is incorrect then we simply face the following:

The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years. He is left open to a future adjudication that although he does not wish to attend School A and has in fact expressed a desire to go elsewhere this is of no importance. Because of his race he can be assigned to a particular school to achieve a result satisfactory to someone who probably does not even live in the district but who wishes to make a racial point. Thus the child reenters the same racial discrimination from which he escaped so short a time ago. He remains bogged in race. Moreover, when Negro children are to be selected by someone, we know not who, to comply with such a racial assignment, on what basis will the selection be made? How will the wishes of some be respected and others rejected, solely because they happen to be of the Negro race? We are not freeing these children of racial chains. We are compounding and prolonging the difficulty.

The true answer remains, give him absolute freedom of choice and see to it that he gets that choice in absolute good faith.

In conclusion, I wish to say that in my own case a burning desire to obtain an education in the face of impossible circumstances is not a theoretical experience encountered only by others. I did not have an

opportunity to attend school until I was eight years of age. The delay was quite unavoidable; there simply was no school to attend at that particular time. My mother taught me how to read and write, to add and subtract. My total sympathies are with the cause of education freely available to all. This, of course, under the Constitution requires no special privileges for any group or segment of the population. I regret that where once the concern was for schools to attend we now have so much strife about the details of utilizing those so readily available.

What I have said herein is with the greatest deference for my Brethren who think otherwise. We must and shall continue to work together according to our individual judgments of the law. The en banc decision may portend more problems ahead than we have heretofore encountered.

I concur in the reversal of the Judgments below, but my views of the issues generally are as herein set forth.

GODBOLD, Circuit Judge, dissenting:

I respectfully dissent. I wish not to delay appellate procedures if any of the parties desire to pursue them. Therefore, I am recording my dissent at this time and will file a dissenting opinion at a later date.

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CORRECTED COPY

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT,
by her father and next friend, BLEVIN STOUT,
Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION,
ET AL,
Appellees.

No. 23331

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF
FAIRFIELD, ET AL,
Appellees.

No. 23335

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL,
Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,

versus

CADDO PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,

versus

THE BOSSIER PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL,
Appellants,

versus

JACKSON PARISH SCHOOL BOARD, ET AL,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

(December 29, 1966.)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

WISDOM, Circuit Judge: Once again the Court is called upon to review school desegregation plans to determine whether the plans meet constitutional standards. The distinctive feature of these cases, consolidated on appeal, is that they require us to reexamine school desegregation standards in the light of

* William Harold Cox, U. S. District Judge for the Southern District of Mississippi, sitting by designation.

the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW).

When the United States Supreme Court in 1954 decided *Brown v. Board of Education*[1] the members of the High School Class of 1966 had not entered the first grade. *Brown I* held that separate schools for Negro children were "inherently unequal".[2] Negro children, said the Court, have the "personal and present" right to equal educational opportunities with white children in a racially nondiscriminatory public school system. For all but a handful of Negro members of the High School Class of '66 this right has been "of such stuff as dreams are made on".[3]

"The *Brown* case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a white

[1] Brown v. Board of Education, 1954, 347 U. S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (*Brown I*). See Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 293, 99 L.Ed. 1083 (*Brown II*).

[2] 347 U. S. at 495.

[3] Shakespeare, The Temptest IV, The cases consolidated for appeal involve Alabama and Louisiana public schools. In Alabama, as of December 1965, there were 1250 Negro pupils, out of a statewide total of 295,848, actually enrolled in schools with 559,123 white students, 0.43% of the eligible Negro enrollment. In Louisiana there were 2187 Negro children, out of a total of 318,651, enrolled in school with 483,941 white children, 0.69% of the total eligible. Southern Education Reporting Service, Statistical Summary of Segregation-Desegregation in the Southern and Border Area from 1954 to the present, 15th Rev. p. 2, Dec. 1965. See Appendix B, Rate of Change and Status of Desegregation. In each of the seven cases before this Court, no start was made toward desegregation of the schools until 1965, eleven years after *Brown*. In all these cases, the start was a consequence of a court order obtained only after vigorous oppoaition by school officials.

school".[4] The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities, and activities.[5] If *Brown*

[4] Braxton v. Board of Public Instruction of Duval County, S.D.Fla. 1962, 7 Race Rel. L. Rep. 675, *aff'd*, 5 Cir. 1964, 326 F.2d 616, *cert. den'd* 377 U. S. 924 (1964). Senator Humphrey cited this case in explaining Section 604 of The Civil Rights Act of 1964. See Section IV D of this opinion.

[5] The mystique that has developed over the supposed difference between "desegregation" and "integration" originated in Briggs v. Elliott, E.D.S.C. 1955, 132 F.Supp. 776: "The Constitution . . . does not require integration. It merely forbids segregation". 132 F.Supp. at 777. This dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that therefore Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class action suits to desegregate a school system. See Section IIIA of this opinion.

The Supreme Court did not use either "desegregation" or "integration" in *Brown*. But the Court did quote with approval a statement of the district court in which "integrated" was used as we use it here. For ten years after *Brown* the Court carefully refrained from using "integration" or "integrated". Then in 1964 in Griffin v. County School Board of Prince Edward County, 375 U.S. 391, 84 S.Ct. 400, 11 L.Ed.2d 409, the Court noted that "the Board of Supervisors decided not to levy taxes or appropriate funds for *integrated* public schools", i.e. schools under a desegregation order. There is not one Supreme Court decision which can be fairly construed to show that the Court distinguished "desegregation" from "integration", in terms or by even the most gossamer implication.

Counsel for the Alabama defendants assert that "desegregation" and "integration" are terms of art. They struggle valiantly to define these words:

> By "desegregation" we mean the duty imposed by *Brown* upon schools which previously compelled segregation to take affirmative steps to eliminate such *compulsory segregation* so as to *allow* the *admission* of students to schools on a non-racial admission basis. By "integration" we mean the actual placing of or attendance by Negro students in schools with whites.

They can do so only by narrowing the definitions to the point of inadequacy. Manifestly, the duty to desegregate schools extends beyond the mere "admission" of Negro students on a non-racial basis. As for "integration", manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools.

In this opinion we use the words "integration" and "desegregation" interchangeably. That is the way they are used in the vernacular. That is the way they are defined in Webster's Third New International Dictionary: "'integrate' to 'desegregate'".

I left any doubt as to the affirmative duty of states to furnish a fully integrated education to Negroes as

The Civil Rights Commission follows this usage: for example, "The Office of Education . . . standards . . . should . . . ensure that free choice plans are adequate to disestablish dual, racially segregated school systems . . . to achieve substantial integration in such systems." U. S. Comm. Survey of School Desegregation 1965-66, p. 54.

The Eighth Circuit used "integration" interchangeably with "desegregation" in Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770. So did the Third Circuit in Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385. See also Brown v. County School Board of Frederick County, Va., W.D.Va. 1965, 245 F. Supp. 549. The courts in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971 and Dove v. Parham, 8 Cir. 1960, 282 F.2d 256 (and the Civil Rights Commission), speak of a school board's duty to "*disestablish* segregation". This term accurately "implies that existing racial imbalance is a consequence of past segregation policies, and, because of this, school boards *have an affirmative duty to remedy racial imbalance*". Note, Discrimination in the Hiring and Assignment of Teachers in Public School Systems, 64 Mich. L. Rev. 692, 698 n.44 (1966). (Emphasis added.)

We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities. The proper governmental objective of the conversion is to offer educational opportunities on equal terms to all.

As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration".

As long as school boards understand the objective of desegregation and the necessity for complete disestablishment of segregation by converting the dual system to a nonracial unitary system, the nomenclature is unimportant. The criterion for determining the validity of a provision in a desegregation plan is whether it is reasonably related to the objective. We emphasize, therefore, the governmental objective and the specifics of the conversion process, rather than the imagery evoked by the pejorative "integration". Decision-making in this important area of the law cannot be made to turn upon a quibble devised over

a class, *Brown II* resolved that doubt. A state with a dual attendance system, one for whites and one for Negroes, must "effectuate a transition to a [single] racially nondiscriminatory system."[6] The two *Brown* decisions established equalization of educational opportunities as a high priority goal for all of the states and compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, nonracial system.

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

We hold, again, in determining whether school desegregation plans meet the standards of *Brown* and

ten years ago by a court that misread *Brown*, misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.

[6] Brown v. Board of Education, 1955, 349 U.S. 294, 301.

other decisions of the Supreme Court,[7] that courts in this circuit should give "great weight" to HEW Guidelines.[8] Such deference is consistent with the exercise of traditional judicial powers and functions. HEW Guidelines are based on decisions of this and other courts, are formulated to stay within the scope of the Civil Rights Act of 1964, are prepared in detail by experts in education and school administration, and are intended by Congress and the executive to be part of a coordinated national program. The Guidelines present the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.

HEW regulations provide that schools applying for financial assistance must comply with certain requirements. However, the requirements for elementary or secondary schools "shall be deemed to be satisfied if such school or school system is subject to a final order of a court of the United States for the desegregation of such school or school system . . ."[9] This regulation causes our decisions to have a two-fold impact on school desegregation. Our decisions determine not only (1) the standards schools must comply with under *Brown* but also (2) the standards these schools must comply with to qualify for federal financial assistance. Schools automatically qual-

[7] Especially Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1399, 3 L.Ed.2d 3; Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Rogers v. Paul, 1965, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265.

[8] Singleton v. Jackson Municipal Separate School District, 5 Cir. 1965, 348 F.2d 729 (*Singleton I*).

[9] 45 C.F.R. §80.4(c) (1964).

ify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order. Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities.[10] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.

Case by case over the last twelve years, courts have increased their understanding of the desegregation process.[11] Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for school boards fleeing from their constitutional duty to estab-

[10] In *Singleton I*, to avoid any such inference, we said: "The judiciary has of course functions and duties distinct from those of the executive department . . . Absent legal questions, the United States Office of Education is better qualified. . . ." 348 F. 2d at 731.

[11] "The rule has become: the later the start, the shorter the time allowed for transition." Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225, 228.

lish an integrated, non-racial school system.[12] With the benefit of this experience, the Court has restudied the School Segregation Cases. We have reexamined the nature of the Negro's right to equal educational opportunities and the extent of the correlative affirmative duty of the state to furnish equal educational opportunities. We have taken a close look at the background and objectives of the Civil Rights Act of 1964.[13]

* * *

We approach decision-making here with humility. Many intelligent men of good will who have dedicated their lives to public education are deeply concerned for fear that a doctrinaire approach to desegregating schools may lower educational standards or even destroy public schools in some areas. These educators and school administrators, especially in communities where total segregation has been the way of life from cradle to coffin, may fail to understand all of the legal implications of *Brown*, but they understand the grim realities of the problems that complicate their task.

The Court is aware of the gravity of their problems. (1) Some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. These men

[12] See Section III A and footnote 5.

[13] The Court asked counsel in these consolidated cases and in five other cases for briefs on the following questions:

(a) To what extent, consistent with judicial prerogatives and obligations, statutory and constitutional, is it permissible and desirable for a federal court (trial or appellate) to give weight to or to rely on H.E.W. guidelines and policies in cases before the court?

(b) If permissible and desirable, what practical means and methods do you suggest that federal courts (trial and appellate) should follow in making H.E.W. guidelines and policies judicially effective?

flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit.[14] The flight of white children to these new schools and to established private and parochial schools promotes resegregation. (3) Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire. (4) Many Negro children, for various reasons, prefer to finish school where they started. (5) The gap between white and Negro scholastic achievements causes all sorts of difficulties. There is no consolation in the fact that the gap depends on the socio-economic status of Negroes at least as much as it depends on inferior Negro schools.

No court can have a confident solution for a legal problem so closely interwoven with political, social, and moral threads as the problem of establishing fair, workable standards for undoing de jure school segregation in the South. The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled deci-

[14] Alabama provides tuition grants of $185 a year and Louisiana $360 a year to students attending private schools. "Only Florida and Texas report no obvious cases of private schools formed to avoid desegregation in public schools." Up to the school year 1965-66, Louisiana had "some 11,000 pupils already receiving state tuition grants to attend private schools." This number will be significantly increased as a result of new private schools in Plaquemines Parish. Leeson, Private Schools Continue to Increase in the South, Southern Education Report, November 1966, p. 23. In Louisiana, students attending parochial schools do not receive tuition grants.

sion consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution. We grasp the nettle.

I.

"No army is stronger than an idea whose time has come."[15] Ten years after *Brown*, came the Civil Rights Act of 1964.[16] Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.[17] Titles IV and VI together

[15] In a press meeting May 19, 1964, to discuss the Civil Rights bill, Senator Everett Dirksen so paraphrased, "On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées." Victor Hugo, Histoire d'un crime: Conclusion: La Chute, Ch. 10 (1877). Senator Dirksen then said, "Let editors rave at will and let states fulminate at will, but the time has come, and it can't be stopped." Cong. Quarterly Service, Revolution in Civil Rights 63 (1965).

[16] H. R. 7152, Pub. L. 88-352, 78 Stat. 243; approved July 2, 1964.

[17] "[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights,' and H. R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." House Judiciary Committee Report No. 914, to Accompany H. R. 7152. 2 U.S. Code Congressional and Administrative News, 88th Cong. 2nd Sess. 1964, 2933. "The transition from all-Negro to integrated schools is at best a difficult problem of adjustment for teachers and students alike. . . . We have tried to point out that the progress in school desegregation so well commenced in the period 1954-57 has been grinding to a halt. The trend observed in 1957-59 toward desegregation by court order

constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregation the United States Office of Education and the Nation's purse.

A. Title IV authorizes the Office of Education to give technical and financial assistance to local school systems in the process of desegregation.[18] Title VI requires all federal agencies administering any grant-in-aid program to see to it that there is no racial discrimination by any school or other recipient of federal financial aid.[19] School boards cannot, however, by giving up federal aid, avoid the policy that produced this limitation on federal aid to schools: Title IV authorizes the Attorney General to sue, in the name of the United States, to desegregate a public

rather than by voluntary action has continued. It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights. . . ." Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell." Ibid., 2487.

[18] 78 Stat. 246-99, 42 U.S.C. § 2000c (1964).

[19] 78 Stat. 252-53, 42 U.S.C. § 2000d (1964). Section 601 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

school or school system.[20] More clearly and effectively than either of the other two coordinate branches of Government, Congress speaks as the Voice of the Nation. *The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems—with or without federal funds.*

The Chief Executive acted promptly to carry into effect the Chief Legislature's mandate. President Lyndon B. Johnson signed the bill into law July 2, 1964, only a few hours after Congress had finally approved it. In the signing ceremony broadcast to the Nation, the President said: "We believe all men are entitled to the blessings of liberty, yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skins. . . . [It] cannot continue."[21] At the request of President Johnson, Vice President Hubert H. Humphrey submitted a report to the President "On the Coordination of Civil Rights Activities in the Federal Government" recommending the creation of a Council on Equal Opportunity. The report concludes that "the very breadth of the Federal Government's effort, involving a multiplicity of programs" necessary to carry out the 1964 Act had created a "problem of coordination." The President approved the recommendation that instead of creating a new agency

[20] 78 Stat. 246-49, 42 U.S.C. § 2000c (1964). In addition, Title IX authorizes the Attorney General to intervene in private suits where persons have alleged denial of equal protection of the laws under the 14th Amendment where he certifies that the case is of "general public importance." 78 Stat. 266, Title IX § 902, 42 U.S.C. § 2000 h-2 (1964).

[21] N.Y. Times, July 3, 1964, p. 1.

there be a general coordination of effort.[22] Later, the President noted that the federal departments and agencies had "adopted uniform and consistent regulations implementing Title VI . . . [in] a coordinated program of enforcement." He directed the Attorney General to "coordinate" the various federal programs in the adoption of "consistent and uniform policies, practices and procedures with respect to the enforcement of Title VI. . . ."[23]

In April 1965 Congress for the first time in its history adopted a law providing general federal aid —a billion dollars a year—for elementary and secondary schools.[24] It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation.[25]

To make Title VI effective, the Department of Health, Education, and Welfare (HEW) adopted the regulation, "Non-discrimination in Federally assisted Programs."[26] This regulation directs the Commissioner of Education to approve applications for fi-

[22] Executive Order 11197, Feb. 9, 1965, 30 F.R. 1721.
[23] Executive Order No. 11247, Sept. 28, 1965, 30 F. R. 12327.
[24] The Elementary and Secondary Education Act of 1965, 79 Stat. 27.
[25] "The Elementary and Secondary Education Act of 1965 greatly increased the amount of federal money available for public schools, and did so in accordance with a formula that pumps the lion's share of the money to low-income areas such as the Deep South. Consequently, Title VI of the Civil Rights Act of 1964 has become the main instrument for accelerating and completing the desegregation of Southern public schools." The New Republic, April 9, 1966 (Professor Alexander M. Bickel).
[26] 45 C.F.R. Part 80, Dec. 4, 1964, 64 F. R. 12539.

nancial assistance to public schools only if the school or school system agrees to comply with a court order, if any, outstanding against it, or submits a desegregation plan satisfactory to the Commissioner.[27]

To make the regulation effective, by assisting the Office of Education in determining whether a school qualifies for federal financial aid and by informing school boards of HEW requirements, HEW formulated certain standards or guidelines. In April 1965, nearly a year after the Act was signed, HEW published its first *Guidelines*, "General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools."[28] These *Guidelines* fixed the fall of 1967 as the target date for total desegregation of all grades. In March 1966 HEW issued "*Revised Guidelines*" to correct most of the major flaws revealed in the first year of operation under Title VI.[29]

B. The HEW Guidelines raise the question: To what extent should a court, in determining whether to approve a school desegregation plan, give weight to the HEW Guidelines? We adhere to the answer

[27] "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . ., contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . ." 45 C.F.R. § 80.4 (a) (1964).

[28] U. S. Department of Health, Education and Welfare, Office of Education, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, April, 1965. It is quoted in full in Price v. Denison Independent School District, 5 Cir. 1965, 348 F.2d at 1010.

[29] Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964. March, 1966.

this Court gave in four earlier cases. The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established *before the Guidelines were promulgated.*[30] Again we hold, "we attach great weight" to the *Guidelines. Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1965, 348 F.2d 729 (*Singleton I*). "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . . [Exceptions to the guidelines should be] confined to those rare cases presenting justiciable, not operational, questions. . . . The applicable standard is essentially the HEW formulae." *Price v. Denison Independent School District,* 5 Cir. 1965, 348 F.2d 1010. "We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education . . . . . In certain school districts and in certain respects, HEW standards may be too low to meet the requirements established by the Supreme Court and by this Court . . . . [But we also] consider it important to make clear that . . . we do not abdicate our judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights." *Singleton v. Jackson Municipal Separate School District,* 5 Cir. 1966, 355 F.2d 815 *(Singleton II).* In *Davis v. Board of School Commissioners of Mobile County,* 5 Cir. 1966, 364 F.2d 896, the most recent school case before this Court, we ap-

[30] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, Judge Tuttle, for the Court, noted that "for more than a year, it has been apparent to all concerned that the requirements of Singleton and Denison were the minimum standards to apply."

proved *Singleton I* and *II* and *Price v. Denison* and ordered certain changes in the school plan in conformity with the HEW Guidelines.

Courts in other circuits are in substantial agreement with this Court. In *Kemp v. Beasley*, 8 Cir. 1965, 352 F. 2d 14, 18-19, the Court said: "The Court agrees that these [HEW] standards must be *heavily relied upon* . . . . [T]he courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines." (Emphasis added.) Concurring, Judge Larson observed: "However, that 'something different' should rarely, if ever be less than what is contemplated by the H.E.W. standards." 352 F.2d at 23. *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770 reaffirms that the Guidelines "are entitled to serious judicial deference".

Although the Court of Appeals for the Fourth Circuit has not yet considered the effect of the HEW standards, district courts in that circuit have relied on the guidelines. See *Kier v. County School Board of Augusta County*, W.D.Va. 1966, 249 F. Supp. 239; *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F. Supp. 378; *Miller v. Clarendon County School District No. 2*, D.S.C., Civil Action No. 8752, April 21, 1966. In *Miller*, one of the most recent of these cases, the court said:

> The orderly progress of desegregation is best served if school systems desegregating

> under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

In this circuit, the school problem arises from state action. This Court has not had to deal with nonracially motivated de facto segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner. See Appendix B, Rate of Change and Status of Desegregation.

II.

We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy.[31] But Congress was dis-

[31] Title IV, § 407, 42 U.S.C. § 2000 (c) authorizing the Attorney General to bring suit, on receipt of a written complaint, would seem to imply this conclusion. Section 409 preserves the right of individual citizens "to sue for or obtain relief" against discrimination in public education. HEW Regulations provide: "In any case in which a final order of a court of the United States for

satisfied with the slow progress inherent in the judicial adversary process.[32] Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but, generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

A. Congress was well aware that it was time for a change. In the decade following *Brown*, court-supervised desegregation made qualitative progress: Responsible Southern leaders accepted desegregation as a settled constitutional principle.[33] Quantitively,

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the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order." 45 C.F.R. § 80.4(c) (1964).

[32] See footnote 17.

[33] "The Federal courts have been responsible for great qualitative advances in civil rights; the lack has been in quantitative implementation—in enabling the individual to avail himself of these great decisions." Bernhard and Natalie, Between Rights and Remedies, 53 Georgetown L. Jour. 915, 916 (1965). "[I]t is the consensus of the judges on the firing line, so to speak, that one phase in the administration of the law—the establishment phase, characterized by permissive tokenism, by a sort of minimal judicial holding of the line while the political process did, as it must, the main job of establishing—this phase has been closed out." Bickel, The Decade of School Desegregation, 64 Colum. L. Rev. 193, 209 (1964). The changes of the past decade have disappointed the most optimistic hopes, but they have been dramatically sweeping nonetheless. Gellhorn, A Decade of Desegregation—Retrospect and Prospect, 9 Utah L. Rev. 3 (1964). "What makes one uneasy, of course is the truly awesome magnitude of what has yet to be done." Marshall, *The Courts*, in Center for the Study of Democratic Institutions, The Maze of Modern Government 36 (1964), quoted in Pollak, Ten Years After the Decision, 24 Fed. Bar Jour. 123 (1964). On the first decade of desegregation, see generally, Sarratt, The Ordeal of Desegregation (1966); Legal Aspects of the Civil Rights Movement (D. B. King ed. 1965).

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the results were meagre. The statistics speak eloquently. See Appendix B, Rate of Change and Status of Desegregation. In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools.[34] In 1965 there was no faculty desegregation in any of these school districts; indeed, none of the 30,500 Negro teachers in Alabama, Louisiana, and Mississippi served with any of the 65,400 white teachers in those states.[35] In the 1963-64 school year, the eleven states of the Confederacy had 1.17 per cent of their Negro students in schools with white students.[36] In 1964-65, undoubtedly because of the effect of the 1964 Act,

[34]

	Total Enrollment		Negroes Admitted To Formerly White Schools
	W	N	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La.	2,394	3,442	5

(Affidavit of St. John Barrett, Attorney, Department of Justice, attached to Motion to Consolidate and Expedite Appeals.)

[35] U. S. Dept. of Health, Education and Welfare, Office of Education Release, Table 3, September 27, 1965. In the 11 states of the Confederacy there are 1800 Negro teachers, 1.8 per cent of all the Negro teachers in Southern schools, assigned to schools with biracial faculties. By contrast, in the border states (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia) 91 per cent of the Negro teachers now teach white students. Ibid.

[36] Southern Education Reporting Service, Statistical Summary, Dec. 1965, cited in U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 1.

the percentage doubled, reaching 2.25. For the 1965-66 school year, this time because of HEW Guidelines, the percentage reached 6.01 per cent. In 1965-66 the entire region encompassing the Southern *and border states* had 10.9 per cent of their Negro children in school with white children; 1,555 biracial school districts out of 3,031 in the Southern and border states were still fully segregated; 3,101,043 Negro children in the region attended all-Negro schools. Despite the impetus of the 1964 Act, the states of Alabama, Louisiana, and Mississippi, still had less than one per cent of their Negro enrollment attending schools with white students.[37]

The dead hand of the old past and the closed fist of the recent past account for some of the slow progress. There are other reasons—as obvious to Congress as to courts. (1) Local loyalties compelled school officials and elected officials to make a public record of their unwillingness to act. But even school authorities willing to act have moved slowly because of uncertainty as to the scope of their duty to act affirmatively. This is attributable to (a) a misplaced reliance on the *Briggs* dictum that the Constitution "does not require integration",[38] (b) a misunderstanding of the *Brown II* mandate, desegregate with "due deliberate speed",[39] and (c) a mistaken no-

[37] *Ibid.*; see footnote 3; Appendix B, Rate of Change and Status of Desegregation.

[38] See Section III A of this opinion.

[39] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, 898, Judge Tuttle, for the Court, said: "This is the fourth appearance of this case before this court. This present appeal, coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability of a

tion that transfers under the Pupil Placement Laws satisfy desegregation requirements." (2) Case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation. There are natural limits to effective legal action. Courts cannot give advisory opinions, and the disciplined exercise of the judicial function properly makes courts reluctant to move forward in an area of the

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continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and towards complete compliance with the constitutional requirements of Brown v. Board of Education, 347 U.S. 483. One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's 'deliberate speed' provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision."

" "The pupil assignment acts have been the principal obstacle to desegregation in the South." U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States 15, 1962. See Note, The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts, 62 Colum. L. Rev. 1448, 1471-73 (1962); Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491. Such laws allow carefully screened Negro children, *on their application*, to transfer to white schools from the segregated schools to which the Negroes were initially unconstitutionally assigned. Often, even after six to eight years of no desegregation, these transfers were limited to a grade a year. When this law first came before us we held it to be unconstitutional. Bush v. Orleans Parish School Board, E.D.La. 1956, 138 F. Supp. 337, *aff'd* 242 F.2d 156, *cert. den'd* 354 U.S. 921 (1957). Later, in a narrowly focused opinion, we held that the Alabama version was constitutional *on its face*. Shuttlesworth v. Birmingham Board of Education, N.D.Ala. 1958, 162 F.Supp. 372, aff'd per curiam, 358 U.S. 101 (1958). As long ago as 1959 and 1960 this Court disapproved of such acts as a reasonable start toward full compliance. Gibson v. Board of Public Instruction of Dade County, 272 F.2d 763; Mannings v. Board of Public Instruction of Hillsborough County, 277 F.2d 370. See also Bush v. Orleans Parish School Board, 5 Cir. 1961, 308 F.2d 491; Evers v. Jackson Municipal Separate School District, 5 Cir. 1964, 328 F.2d 408. "[T]he entire public knows that in fact [the Louisiana law] . . . is being used to maintain segregation. . . . It is not a plan for desegregation at all." Bush v. Orleans Parish School Board, 308 F. 2d at 499-500.

law bordering the periphery of the judicial domain. (3) The contempt power is ill-suited to serve as the chief means of enforcing desegregation. Judges naturally shrink from using it against citizens willing to accept the thankless, painful responsibility of serving on a school board.[41] (4) School desegregation plans are often woefully inadequate; they rarely provide necessary detailed instructions and specific answers to administrative problems.[42] And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers. (5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional

[41] Bush v. Orleans Parish School Board is an example. The board was plagued by bundles of Louisiana statutes aimed at defeating desegregation. There were five extra sessions of the Louisiana legislature in 1960. After the School Board had for three years failed to comply with an order to submit a plan, the district judge wrote one himself. The trial judge simply said: "All children [entering New Orleans public schools . . . . may attend either the formerly all white public schools nearest their homes, or the formerly all Negro public schools nearest their homes, at their option. B. Children may be transferred from one school to another, provided such transfers are not based on race". 204 F.Supp. 568, 571-72.

[42] For example, the order of the able district judge in *Bush*. See footnote 41. Judge Bohanon underscored this point in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971, 976: "The plan submitted to this Court . . . . is not a plan, but a statement of policy. School desegregation is a difficult and complicated matter, and, as the record shows, cannot be accomplished by a statement of policy. 'Desegregation of public schools in a system as large as Oklahoma City requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated."

statutory recognition of school desegregation as the law of the land.[43]

"Considerable progress has been made . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious."[44] Title VI of the Civil Rights Act of 1964, therefore, was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necessary to

[43] The Civil Rights Act of 1964 had its direct genesis in President Kennedy's message to Congress of June 19, 1963, urging passage of an omnibus civil rights law. He noted: "In the continued absence of congressional action, too many state and local officials as well as businessmen will remain unwilling to accord these rights to all citizens. Some local courts and local merchants may well claim to be uncertain of the law, while those merchants who do recognize the justice of the Negro's request (and I believe these constitute the great majority of merchants, North and South) will be fearful of being the first to move, in the face of official customer, employee, or competitive pressures. Negroes, consequently, can be expected to continue increasingly to seek the vindication of these rights through organized direct action, with all its potentially explosive consequences, such as we have seen in Birmingham, in Philadelphia, in Jackson, in Boston, in Cambridge, Md., and in many other parts of the country. In short, the result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering domestic tranquillity, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us. No American, I feel sure, would prefer this course of tension, disorder, and division—and the great majority of our citizens simply cannot accept it." H.Doc. 124, 88th Cong. 1st Sess. June 20, 1963, Rep. Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. 7152 embodying the President's proposals. The same day Senator Mike Mansfield introduced a similar bill, S. 1731. H.R. 7152-S.1731, as amended, became the Civil Rights Act of 1964.

[44] H. Rep. No. 914, 88th Cong., 1st Sess.

rescue school desegregation from the bog in which it had been trapped for ten years.[45]

The Civil Rights Commission, doubtless better able than any other authority to understand the significance of the Civil Rights Act of 1964, had this to say about Title VI:

> "This statute heralded a new era in school desegregation . . . Most significantly . . . Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of school boards and district-by-district litigation. . . . During fiscal year 1964, $176,546,992 was distributed to State and local school agencies in the 17 Southern and border States. The passage of the Elementary and Secondary Education Act of 1965 added an additional appropriation of $589,946,135 for allocation to the 17 Southern and border States for fiscal year 1966. With funds of such magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance."[46]

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[45] "It was the Congressional purpose, in Title VI of the Civil Rights Act of 1964, to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. Unless the power of the Federal purse is more effectively utilized, resistance to national policy will continue and, in fact, will be reinforced." Report of the White House Conference "To Fulfill These Rights", June 1-2, 1966, p. 63.

[46] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 2.

B. The congressional mandate, as embodied in the Act and as carried out in the HEW Guidelines, does not conflict with the proper exercise of the judicial function or with the doctrine of separation of powers. It does however profoundly affect constructive use of the judicial function within the lawful scope of sound judicial discretion. When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. Here the Chief Executive acted promptly to bring about uniform standards for desegregation. The judicial branch too should cooperate with Congress and the executive in making administrative agencies effective instruments for supervising and enforcing desegregation of public schools. Justice Harlan F. Stone expressed this well:

> "Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. Its aim is so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, whenever reasonably possible, effective

instruments for law enforcement, and not to destroy them."[47]

In an analogous situation involving enforcement of the Fair Labor Standards Act, the Supreme Court has said, "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore v. Swift & Co.*, 1944, 323 U. S. 134, 65 S.Ct. 161, 89 L.Ed. 124. In an appeal from the district court's denial of an injunction to enforce labor standards under the Act this Court has pointed out:

"... this proceeding is only superficially related to a suit in equity for an injunction to protect interests jeopardized in a private controversy. The public interest is jeopardized here. The injunctive processes are a means of effecting general compliance with national

[47] Stone, The Common Law in the United States, 50 Harv. L. Rev. 1, 18 (1936). In a similar vein, writing for the Court, Justice Stone has said: "... in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." United States v. Morgan, 1939, 307 U. S. 183, 191, 59 S. Ct. 795, 799, 83 L.Ed. 1211.

policy as expressed by Congress, a public policy judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium. . . . Implicit in the defendants' non-compliance, as we read the briefs and the record, is a certain underlying, not unnatural, Actonian distaste for national legislation affecting local activities. But the Fair Labor Standards Law has been on the books for twenty-three years. The Act establishes a policy for all of the country, and for the courts as well as for the agency required to administer the law. Mitchell v. Pidcock, 5 Cir. 1962, 299 F.2d 281, 287, 288.

C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are.

The Guidelines do not purport to be a rule or regulation or order. They constitute a statement of policy under section 80.4(c) of the HEW Regulations issued after the President approved the regulations December 3, 1964. HEW is under no statutory compulsion to issue such statements. It is, however, of manifest advantage to school boards throughout the country and to the general public to know the criteria the Commissioner uses in determining whether a

school meets the requirements for eligibility to receive financial assistance.

The Guidelines have the vices of all administrative policies established unilaterally without a hearing. Because of these vices the courts, as the school boards point out, have set limits on administrative regulations, rulings, policies, and practices: an agency construction of a statute cannot make the law; it must conform to the law and be reasonable. To some extent the administrative weight of the declarations depends on the place of such declarations in the hierarchy of agency pronouncements extending from regulations down to general counsel memoranda and inter-office decisions. See *Manhattan General Electric Company v. Commissioner*, 1936, 297 U. S. 129, 56 S.Ct. 397, 80 L.Ed. 528; *United States v. Bennett*, 5 Cir. 1951, 186 F.2d 407; *United States v. Mississippi Chemical Corporation*, 5 Cir. 1964, 326 F. 2d 569; *Chattanooga Auto Club v. Commissioner*, 6 Cir. 1950, 182 F.2d 551.

These and similar decisions are not inconsistent with the courts' giving great weight to the HEW's policy statements on enforcement of Title VI. In *Skidmore v. Swift & Co.*, 323 U.S. 134, an action was commenced in a federal district court by employees of Swift & Co. to recover wages at the overtime rates prescribed by the Fair Labor Standards Act (52 Stat. 1060, et seq.) for certain services which they had performed. At issue was whether these services constituted "employment" within the meaning of sec-

tion 7 (a) of that act. The district court and this Court, on appeal, decided this issue against the plaintiffs. The Supreme Court reversed. After acknowledging (323 U.S. at 137) that the statute had granted no rule-making power to the Wage and Hour Administrator with respect to the issue at hand ("[i]nstead, it put this responsibility on the courts"), the Court referred to an "Interpretative Bulletin" issued by the Administrator containing his interpretation of the statutory phrase in question. The Supreme Court said:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[48]

[48] The Supreme Court also stated in *Skidmore*, 323 U. S. at 139-40: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized

The Supreme Court found that the lower courts had misunderstood their function vis-a-vis the Interpretative Bulletin and remanded the case. See also, *United States v. American Trucking Association*, 1940. 310 U. S. 543, 549; *Goldberg v. Servas*, 1 Cir. 1961, 294 F.2d 841, 847.

The national importance of the HEW Guidelines, the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools.

D. Because our approval of a plan establishes eligibility for federal aid, our standards should not be lower than those of HEW. Unless judicial stand-

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experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. *Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.*" (Emphasis added.)

ards are substantially in accord with the Guidelines, school boards previously resistant to desegregation will resort to the courts to avoid complying with the minimum standards HEW promulgates for schools that desegregate voluntarily. As we said in *Singleton I*:

> "If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumventing the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus." 348 F.2d at 731.

In *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, the Court concluded:

> "[HEW] standards must be heavily relied upon. . . . Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those

promulgated by the executive." 352 F.2d at 18, 19.

Concurring, Judge Larson, speaking from his experience as a district judge, pointed out that school boards which do not act voluntarily retard the desegregation process to the disadvantage of the individual's constitutional rights: "Judicial criteria", therefore, "should probably be more stringent" than HEW Guidelines:

> "A school board which fails to act voluntarily forces Negro students to solicit aid from the courts. This not only shifts the burden of initiating desegregation, but inevitably means delay in taking the first step. As Judge Gibson observes, we are not here concerned with regulating the flow of Federal funds. Our task is to safeguard basic constitutional rights. Thus, our standards should be directed toward full, complete, and final realization of those rights." 352 F.2d at 23.

The announcement in HEW regulations that the Commissioner would accept a final school desegregation order as proof of the school's eligibility for federal aid prompted a number of schools to seek refuge in the federal courts. Many of these had not moved an inch toward desegregation.[49] In Louisiana

[49] The following statement appeared in the Shreveport Journal for July 1, 1965: "The local school boards prefer a court order over the voluntary plan because HEW regulations governing the voluntary plans or compliance agreements demand complete desegregation of the entire system, including students, faculty, staff, lunch workers, bus drivers, and administrators, whereas the court-ordered plans can be more or less negotiated with the judge." This was not news to the Court.

alone twenty school boards obtained quick decrees providing for desegregation according to plans greatly at variance with the Guidelines.[50]

We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for foot-dragging.

E. The experience this Court has had in the last ten years argues strongly for uniform standards in court-supervised desegregation.

The first school case to reach this Court after *Brown v. Board of Education* was *Brown v. Rippey*, 5 Cir. 1956, 237 F.2d 796. Since then we have reviewed 41 other school cases, many more than once.[51] The

[50] We may also expect a number of school desegregation suits to be filed in Alabama. The legislature has enacted a statute declaring the Guidelines null and void in Alabama and prohibiting school officials signing any agreement to comply. The bill provides that any agreement or assurance of compliance with the guidelines already in effect "is null and void and shall have no binding effect." H.B. 446, approved September 2, 1966.

[51] The brief of the United States gives the following figures:

"1. Case Load

	District Court	Court of Appeals	Supreme Court
Number of Cases	128	42	5
Number of Orders Entered	513	76	10

2. Frequency of Appeals to this Court

Number of Cases With One or More Appeals	42
Number of Cases With Two or More Appeals	21
Number of Cases With Three or More Appeals	8
Number of Cases With Four or More Appeals	4
Number of Cases With Five or More Appeals	2

In Bush v. Orleans Parish School Board the complaint was filed September 5, 1952. Bush's peregrinations through the courts are reported as follows: 138 F.Supp. 336 (3-Judge 1956) motion for leave to file petition for mandamus denied, 351 U. S. 948 (1956); 138 F. Supp. 337

district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation.[32] In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts.[33] In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of

(1956), aff'd 242 F.2d 156 (1957), cert. den'd, 354 U.S. 921 (1957); 252 F.2d 253, cert. den'd 356 U.S. 969 (1958); 163 F. Supp. 701 (1958), aff'd, 268 F.2d 78 (1959); 187 F. Supp. 42 (3-judge 1960), motion to stay den'd, 364 U.S. 803 (1960), aff'd 365 U.S. 569 (1961); 188 F. Supp. 916 (3-judge 1960), motion for stay denied, 364 U.S. 500 (1960), aff'd, 365 U.S. 569 (1961); 190 F. Supp. 861 (3-judge 1960), aff'd 366 U.S. 212 (1961); 191 F. Supp. 871 (3-judge 1961), aff'd 367 U.S. 908 (1961); 194 F. Supp. 182 (3-judge 1961), aff'd, 367 U.S. 907 (1961), 368 U.S. 11 (1961); 204 F. Supp. 568 (1962); 205 F. Supp. 893 (1962), aff'd in part and rev'd in part, 308 F.2d 491 (1962); 230 F. Supp. 869 (1963).

[32] Of the 99 court-approved freedom of choice plans in this circuit, 44 do not desegregate all grades by 1967; 78 fail to provide specific, non-racial criteria for denying choices; 79 fail to provide any start toward faculty desegregation; only 23 provide for transfers to take courses not otherwise available; only 4 include the *Singleton* transfer rule.

[33] See footnote 39.

local responsibility for the administration of schools without regard to race or color. What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome.

Before HEW published its Guidelines, this Court had already established guidelines for school desegregation: to encourage uniformity at the district court level and to conserve judicial effort at both the district court and appellate levels. We did so by making detailed suggestions to the district courts. *Lockett v. Board of Education of Muscogee County*, 5 Cir. 1964, 342 F.2d 225; *Bivens v. Board of Education for Bibb County*, 5 Cir. 1965, 242 F.2d 229; *Armstrong v. Board of Education of Birmingham*, 5 Cir. 1964, 333 F.2d 47; *Davis v. Board of School Commissioners of Mobile County*, 5 Cir. 1964, 333 F.2d 53; *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55; *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. In other areas of the law involving recurrent problems of regional or national interest, this Court has also found guidelines advantageous. In *United States v. Ward*, 5 Cir. 1965, 347 F.2d 795, and *United States v. Palmer*, 5 Cir. 1966, 356 F.2d 951, suits to enjoin registrars of voters from discriminating against Negroes, we attached identical proposed decrees for the guidance of district courts.[54] See also

[54] In *Ward* the Court said: "[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration

Scott v. Walker, 5 Cir. 1966, 358 F.2d 561, one of a series of cases on the exclusion of Negroes from juries.

F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidelines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation.[55] It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964

III.

The defendants contend that the Guidelines require integration, not just desegregation; that school boards have no affirmative duty to integrate. They say that

itself. It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay." 349 F.2d at 805.

[55] "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. Board of Education had been denied Prince Edward County Negro children." Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 229, 84 S.Ct. 1226, 12 L.Ed.2d 256, 264. See also Rogers v. Paul and Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ." (Goldberg, J.) Watson v. City of Memphis, 1963, 373 U.S. 526, 530, 83 S.Ct. 1314, 1317, 10 L.Ed.2d 529, 534.

in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. *This argument rests on nothing that the United States Supreme Court held or said in Brown or in any other case.* It rests on two glosses on *Brown*: the opinions in *Briggs v. Elliott*, E.D.S.C. 1955, 132 F. Supp. 776 and *Bell v. School City of Gary*, N.D. Ind. 1963, 213 F. Supp. 819, aff'd, 7 Cir. 1963, 324 F.2d 209. *Briggs*, decided only six weeks after *Brown II*, is one of the earliest cases in this field of law. The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron v. Cooper*, *Rogers v. Paul* and *Bradley v. School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. As for *Bell*, it is inapplicable to cases in this circuit, all of which involve formerly de jure segregated schools. Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and quoted these two opinions they did so within the context of the problem of de facto segregation. A study of the Guidelines shows that the HEW standards are within the rationale of *Brown* and the congressional objectives of the Act.

A. *Briggs*, an action to desegregate the public schools in Clarendon County, South Carolina, was one

of the school cases consolidated with *Brown v. Board of Education of Topeka, Kansas*. On remand, a distinguished court (Parker and Dobie, Circuit Judges, and Timmerman, District Judge) felt that it was important to "point out exactly what the Supreme Court has decided and what it has not decided." The Court said:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids segregation.*" 132 F. Supp. at 777.

Ten years later Clarendon County schools were still totally segregated.[56]

This Court and other courts, gratuitously for the most part, have often paraphrased or quoted with approval the *Briggs* dictum.[57] It is not surprising,

[56] See Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107; Southern Education Reporting Service, Statistical Summary, Nov. 1964, p. 46.

[57] The Fifth Circuit cases are: Borders v. Rippy, 1957, 247 F.2d 268, 271; Boson v. Rippy, 1960, 285 F.2d 43, 48; Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225; Avery v. Wichita Falls Independent School District, 1966, 241 F.2d 230, 233; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55, 59; Evers v. Jackson, 1964, 328 F.2d 408; cf.

therefore, that *Briggs* prompted Pupil Placement Laws, the most effective technique for perpetuating school segregation. And it is not surprising that school officials—the *Briggs* dictum dinned into their ears for a decade—have not now faced up to faculty integration. However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of *Briggs*. In *Singleton I* we referred to the dictum as "inconsistent with Brown [II] and the later development of decisional and statutory law in the area of civil rights." 348 F. 2d at 730 n.5. In *Singleton II* we called it an "oversimplified" construction of *Brown I*. We added: "The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system." 355 F.2d at 369.

Cohen v. Public Housing Administration, 1958, 257 F.2d 73 (public housing); City of Montgomery v. Gilmore, 1960, 277 F.2d 364 (public parks). For a list of cases in other circuits see footnotes 10 and 11 in Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 220. In *Blocker* Judge Zavitt notes that "the construction draws continuing sustenance through a process in which each case relies upon a preceding one; it would appear that the ultimate and solitary source is this dictum in Briggs v. Elliott." 226 F. Supp. at 220.

In Borders v. Rippy, 5 Cir. 1957, 247 F.2d 268, the Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment enjoining the defendants "from requiring segregation of the races in any school under their supervision". On remand, the district court entered an order enjoining the defendants "from requiring or *permitting* segregation of the races in any school under their supervision". On the second appeal, in Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, 692, the Court again reversed the district court, stating: "We have emphasized the words *'or permitting segregation of the races'* in the district court's order because that expression might indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate (footnote 1, supra) had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants *'from requiring segrega-*

Other federal courts have disapproved of the *Briggs* dictum.[58]

tion of the races in any school under their supervision' (emphasis supplied). Likewise in our opinion, we had pointed out that is only *racially discriminatory* segregation in the public schools which is forbidden by the Constitution."

[58] In Kemp v. Beasley the Eighth Circuit remarked, "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with Brown." Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F.Supp. 208, makes a frontal attack on *Briggs*. In that case, which concerned segregation characterized as *de jure*, Judge Zavitt observed that even where the *Briggs* dictum has seemingly been adopted, "it appears to be in a state of diminishing force, if not outright erosion", citing Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, *cert. denied*, 374 U.S. 827 (1963), and McCoy v. Greensboro City Board of Education, 4 Cir. 1960, 283 F.2d 667. The Third Circuit, reversing a district court's approval of a year-by-year plan, ignored *Briggs:* "if the plan as approved by the court below be not drastically modified, a large number of the Negro children of Delaware will be deprived of education *in integrated* schools, despite the fact that the *Supreme Court has unqualifiedly declared integration to be their constitutional right.*" (Emphasis added.) Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385, 389, *cert. den'd* 364 U.S. 933. In Evans v. Ennis, only three school districts were involved. Nevertheless, the court required the district judge to order the State Board of Education and the State Superintendent of Delaware to prepare "a plan which will provide for the *integration* of all grades of the public school system of Delaware." "Eventually", Judge Biggs said, "a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children, whether white or Negro, . . . will attend schools without regard to race or color." Sometimes a court's action in regard to the school board's affirmative duty has spoken louder than *Briggs's* words. In Evans v. Buchanan, D.C. Del. 1962, 207 F. Supp. 820, although the court cited *Briggs* and stated that the Fourteenth Amendment "does not contemplate compelling action; rather it is a prohibition preventing the States from applying their laws unequally", the court did compel the school boards to act. The Court found that the Negro school children who wished to attend integrated schools were attending an all-Negro school, with an all-Negro faculty, surrounded by white attendance area. On those bare facts, the Court found: "The . . . Board as promulgator of the plan and the State Board of Education as the party having the ultimate responsibility for administering a nondiscriminatory system of public education should have the initial burden of coming forward *since a presumption of unconstitutionality arises* under this set of facts." 207 F. Supp. at 825. (Emphasis added.) The facts were "highly probative" of intentional

The *Briggs* dictum may be explained as a facet of the Fourth Circuit's now abandoned view that Fourteenth Amendment rights are exclusively individual rights and in school cases are to be asserted individually after each plaintiff has exhausted state administrative remedies.[59] The Court disallowed class suits because Negro students who had not asked for transfers to white schools had not individually exhausted their remedies and were therefore not similarly situated with the plaintiffs. Thus in *Carson v. Warlick*, 4 Cir. 1956, 238 F.2d 724, Judge John Parker, for the Court, stated:

> "There is no question as to the right of these [Negro] school children. . . . They are to be admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. . . . [The] school board must pass upon individual applications made individually to the board. . . ." 238 F.2d at 729.

In *Covington v. Edwards*, 4 Cir. 1959, 264 F.2d 780, 783, the court commented that "the County board has taken no steps to put an end to the planned segre-

racial discrimination and the evidence of intent rested largely with the Board. The Board came forward and showed that its plan was based on such neutral factors as the safety of the children, facilities, location, and access roads. The court, however, held that the Board did not rebut the presumption by showing that the plan could be justified as rational and nondiscriminatory. The obviously sophisticated trial judge observed, "In effect, counsel is asking the States to intentionally gerrymander districts which may be rational when viewed by acceptable, nondiscriminatory criteria". *Id.* at 824.

[59] See U. S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States (1962), p. 7.

gation", but still held for the board for failure of the plaintiffs to exhaust their remedies and for filing the suit as a class action. In a later opinion in this case, sub.nom. *Jeffers v. Whitley*, 309 F.2d 621, the Court found that the plaintiffs had failed to establish that they were "denied any constitutional right because of their race or color". The court observed,

> "It can fairly be said that what the children and their parents are still seeking is only a desegregation of the Conwell County School System rather than a protection of their own rights. . . ."

The Fourth Circuit abandoned this view in *Green v. School Board of the City of Roanoke*, 4 Cir. 1962, 304 F.2d 118, holding that since administrative remedies need not be exhausted, a class suit is proper. "[It] would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of a racial assignment." *Jackson v. School Board of City of Lynchburg*, W.D. Va. 1962, 201 F. Supp. 620. *McNeese v. Board of Education for School District 187*, 1963, 373 U. S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, put beyond debate the need to exhaust remedies and the right of Negro students to file a class action. See also *Armstrong v. Board of Education of the City of Birmingham*, 5 Cir. 1963, 323 F.2d 333, cert. denied sub.nom. *Gibson v. Harris*, 376 U.S. 905 (1964).

In the sense that an individual pupil's right under the equal protection clause is a "personal and present" right not to be discriminated against by being segregated,[60] the dictum is a cliché. The Fourteenth Amendment provides, "nor shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws". The dictum may also be defensible, if the *Briggs* court used the term "integration" to mean an absolute command at all costs that each and every Negro child attend a racially balanced school.[61] But what is wrong about the dictum is more important than what is right about it. What is wrong about *Briggs* is that it drains out of *Brown* that deci-

[60] For example: ". . . the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded". McCabe v. Atchison, T. & S.F. Ry., 1914, 235 U. S. 151, 161-62, 35 S.Ct. 69, 59 L.Ed. 169. The legislative history of the 14th Amendment provides no information on this point. See Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Colum. L. Rev. 131 (1950); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). But "the personal nature of the right to be free from discrimination was declared in order to make the existence of such right independent of the number of other members of the *same* racial group who were victimized by the discrimination. . . ." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 427 (1963).

[61] What is meant by the statement of "no duty to integrate" is that a school board "does not have to completely alter boundaries and to insure that every school district is mixed, even though some students will have a great distance to travel . . . [E]ven though the state is not required to integrate fully every school and child, this does not mean that the state may not have certain responsibilities to children of a minority race while educating them, the failure to perform which may be unconstitutional". Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 251 (1963). See also the discussion of Barksdale v. Springfield School Comm., at 65-67, infra.

sion's significance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems.[62] All four of the original *School Segregation* cases were class actions and described as such in the opinions. 347 U. S. at 455.

We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there

[62] Rule 23a, Fed. R. Civ. P., before the recent amendments, was unclear as to whether a favorable decree applies to members of the class who do not join in the suit. *Compare* 3 Moore, Federal Practice 3434 (2d Ed.) *with* Chafee, Some Problems in Equity 199-295 (1950). "In dealing with [segregation] cases, courts have largely disregarded Moore's classifications, and have indicated that an injunction would run to the benefit of absentees." Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958). Citing *Brown II*, 349 U. S. at 300-301 dictum; *Brown I*, 347 U. S. at 495 (dictum); Orleans Parish School Board v. Bush, 5 Cir. 1957, 242 F.2d 156, 165-66 (dictum); Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707, 711, 714, aff'd per curiam, 352 U. S. 903 (1956); Frasier v. Board of Trustees of University of North Carolina, M.D.N.C. 1955, 134 F. Supp. 589, *aff'd per curiam*, 350 U. S. 979 (1956).

"Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed . . . generally because of race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23. . . . than are other several rights." Kansas City v. Williams, 8 Cir. 1953, 205 F.2d 47, 52, *cert. denied* 346 U. S. 826 (1953). See also Holmes v. City of Atlanta, N. D. Ga. 1954, 124 F. Supp. 290, aff'd 223 F.2d 93, judgment vacated and remanded for a broader decree in conformity with Mayor and City of Baltimore v. Dawson, 350 U. S. 977 (1955); Jeffers v. Whitley, 4 Cir. 1962, 309 F.2d 621; Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107, *cert. denied* 373 U. S. 933 (1963).

See Comment, The Class Action Device in Antisegregation Cases, 20 U. Chi. L. Rev. 577 (1953). See also Comment, Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935; McKay, "With All Deliberate Speed"—A Study of School Desegregation, 31 N.Y.U.L. Rev. 991, 1084-86 (1956); Class Actions—A Study of Group Interest Litigation, 1 Race Rel. Rep. 991 (1956); Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.

Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restric. Negroes as a class from participation in the life of the community, the affairs of the State, and the mainstream of American life: Negroes must keep their place.[62]

"[S]egregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a uni' and against individuals only as their connection w.. the group in-

[62] In United States v. Louisiana, E.D. La. 1963, 225 F. Supp. 353, aff'd 380 U.S. 145, the court traced the history of voting in Louisiana to show that the black codes, the grandfather clause, the white primary, literacy tests, and other devices were all members of a seemingly endless series designed to bar access of Negroes to the dominant culture and to political power. The same situation exists with regard to denial of equal educational opportunities. So-called freedom of choice plans, *as thus far utilized*, follow pupil placement laws, which followed the "separate-but-equal" dodge in the educational series of devices to limit access of Negroes to the polity.

volves the antigroup sanction. . . . [As] a group-wrong . . . the mode of redress must be group-wide to be adequate."[64] Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation. "Beyond [a child's] personal right [under the Fourteenth Amendment] however, or perhaps as an aspect of it, the lower federal courts seem to be recognizing a right in Negro school children, enforceable at least by a class action, *to have the school system administered free of an enforced policy of segregation* irrespective of whether any colored pupil has been denied admission to any particular school on the ground of his race."[65]

It is undoubtedly true that the intangible inadequacies of a segregated education harm the individual, but the Supreme Court treated these inadequacies as inherent attributes which prevail universally.[66] For example, the Court said:

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[64] Note, 20 U. Chi. L. Rev. 577 (1953).

[65] Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

[66] In *Brown* the unanimous court, through Chief Justice Warren, cited the Slaughter House Cases, 1872, 83 U.S. (16 Wall.) 36, 71 in which the Court stated: ". . . one pervading purpose found in [all of these amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." The Court also quoted the following passage from Strauder v. West Vir-

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in *awakening the child to cultural values*, in preparing him for later professional training, and in *helping him to adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to succeed if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms 347 U.S. at 493. (Emphasis added.)

Again, in a critical passage:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone. 347 U.S. at 494.

With this predicate it is not surprising that *Brown II*, a year after *Brown I* was decided, going beyond recognition of the "*personal*" right in the individual plaintiffs, fashioned a remedy appropriate for the class. The Court imposed on the states the duty of furnishing an integrated school system, that is, the

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ginia, 1879, 100 U.S. 303, 307: "The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

duty of "effectuat[ing] a transition to a racially nondiscriminatory school *system*."[67] (Emphasis added.) In addition, *Brown II* subordinated the "*present*" right in the individual plaintiffs to the right of Negroes as a class to a unitary, nonracial system—some time in the future.[68]

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning per-

[67] "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Education, 349 U.S. 294, 300-01. (Emphasis added.)

[68] "If it is the Negro population as a minority group which is entitled to attend public facilities, then the objective of any corrective plan would be to bring about complete integration of all Negro children in public education." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 441 (1963). Cf. Greenberg, Race Relations and Group Interests in the Law, 13 Rutgers L. Rev. 503, 506 (1959). There would be no necessary conflict between the individual's "personal and present" right and the class right if the Brown, Cooper v. Aaron, Bradley, and Rogers v. Paul decisions were read as recognizing the immediate right of any Negro plaintiff to transfer to a white school, over and above the state's duty to reorganize its school system. Thus in Watson v. City of Memphis, 1963, 373 U.S. 526, 533, 83 S.Ct. 1314, 10 L.Ed.2d 529, the Supreme Court stated that the rights asserted in that case "are, like all such rights, *present* rights . . . warrants for the here and now and, unless there is an overwhelmingly compelling reason they are to be promptly fulfilled."

sists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zones into a single system. Faculties, facilities, and activities as well as student bodies must be integrated. No matter what view is taken of the rationale in *Brown I*, *Brown II* envisaged the remedy following the wrong, the state's correcting its discrimination against Negroes as a class, through separate schools, by initiating and operating a unitary integrated school system. The gradual transition the Supreme Court authorized was to allow the states time to solve the administrative problems inherent in that change-over. *No delay would have been necessary if the right at issue in* Brown *had been only the right of individual Negro plaintiffs to admission to a white school. Moreover, the delay of one year in deciding* Brown II *and the gradual remedy* Brown II *fashioned can be justified only on the ground that the "personal and present" right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education.*

Although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation, a state policy of apartheid aggravates the harm. Thus, Chief Justice Warren quoted with approval the finding of the district court in the *Kansas* case: "The impact [of the detrimental effect of segregation upon Negro children] is greater when it has the sanction of the law; for the policy of separating the race is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive *in a racial[ly] integrated school system.*" (Emphasis added.) *Brown I*, 347 U.S. at 494. The State, therefore, should be under a duty to take whatever corrective action is necessary to undo the harm it created and fostered.** "State authorities

** "Indeed, the requirement of affirmative action lies at the very heart of Brown; seventeen states had to abandon racial criteria and affirmatively reorganize school attendance plans." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.Rev. 564, 612 (1965). See also Gillmor and Gosule, Duty to Integrate Public Schools?. Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 62-3 (1966). "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the equal protection clause." Cooper v. Aaron, 1958, 358 U.S. 1, 19, 78 S.Ct. 1401, 3 L.Ed.2d 5. ". . . Most of the major decisions of the Warren Court under the equal protection clause impose affirmative obligations upon the states. Earlier cases sustaining a constitutional claim were typically mandates directing the government to refrain from a particular form of regulation. Now the emphasis is upon measures the states must adopt in carrying on their activities and steps they must take [even] to offset disabilities not of their creation". Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 93 (1966).

were thus *duty bound* to devote every effort toward *initiating desegregation* and bringing about the elimination of racial discrimination in the public school *system.*" (Emphasis added.) *Cooper v. Aaron,* 358 U.S. at 7. Some may doubt whether tolerance of de facto segregation is an unsubtle form of state action. There can be no doubt as to the nature and effect of segregation that came into being and persists because of state action as part of the longstanding pattern to narrow the access of Negroes to political power and to the life of the community.

In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system. As Judges Sobeloff and Bell said in *Bradley v. School Board of the City of Richmond,* 4 Cir. 1965, 345 F.2d 310, 322:

> "*. . . the initiative in achieving desegregation of the public schools must come from the school authorities. . . . Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity. 'You now have a choice.' . . .* It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. (Emphasis added.)

In *Northcross v. Board of Education of the City of Memphis*, 6 Cir. 1962, 302 F.2d 818, the defendants asserted, as the defendants assert here, that continued segregation is "voluntary on the part of Negro pupils and parents because they do not avail themselves of the transfer provisions." The Court held: "The Pupil Assignment Law . . . will not serve as a plan to convert a biracial system into a nonracial system . . . Negro children cannot be required to apply for that to which they are entitled as a matter of right. . . . *The burden rests with the school authorities to initiate desegregation . . . [The Board] should submit some realistic plan for the organization of their schools on a nonracial basis*". (Emphasis added.) In *Dowell v. School Board of Oklahoma City Public Schools*, W. D. Okla. 1965, 244 F. Supp. 971, 975, 978-79, the School Board in Oklahoma City had "superimposed" a geographic zone plan on "already existing residential segregation initiated by law." The court held: A school board must "adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. . . .[The] failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up . . . the desegregation process. . . . [W]*here the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* This conclusion makes no new law."

The position we take in these consolidated cases is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.* In *Singleton I* the Court touched on the state's duty to integrate:

> "In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights." 348 F.2d at 730 n.5.

Three years before *Singleton I* this Court analyzed the problem in *Potts v. Flax*, 5 Cir. 1963, 313 F.2d 284. In that case the Court rejected a school board's contention that a suit brought by two Negro parents was not a class action even though the record contained testimony that one parent was bringing the action only for his own children and not for other Negro children. The Board contended that a court order was not needed because it was willing to admit any Negro child to a white school on demand of any Negro child. Judge Brown, speaking for the Court, said:

> "Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the *system-wide policy* of racial segrega-

> tion. It sought obliteration of that policy of system-wide racial discrimination. . . ."[70]

Even before *Potts v. Flax,* in *Bush v. Orleans Parish School Board,* 5 Cir. 1962, 308 F.2d 492, 499, the Court said:

> "In this aspect of [initial] pupil assignment [to segregated schools] the facts present a clear case where there is not only deprivation of the rights of the individuals directly concerned but deprivation of the rights of Negro school children as a class. As a class, and irrespective of any individual's right to be admitted on a non-racial basis to a particular school, Negro children in the public schools have a constitutional right to have the public school system administered free from an administrative policy of segregation."[71]

[70] The Court also said: "There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. Shelley v. Kramer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimination proscribed by Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also Ross v. Dyer, 5 Cir. 1962, 312 F.2d 191." Potts v. Flax, 313 F.2d at 289.

[71] The Court also said: "Geographical districts based on race are a parish-wide system of unconstitutional classification. Of course, it is undoubtedly true that Brown v. Board of Education

See also *Ross v. Dyer*, 5 Cir. 1963, 312 F.2d 191, 194-95; *Augustus v. Board of Public Instruction of Escambia County*, 5 Cir. 1963, 306 F.2d 862, 869; *Holland v. Board of Public Instruction of Palm Beach County*, 5 Cir. 1958, 258 F.2d 730; *Orleans Parish School Board v. Bush*, 5 Cir. 1957, 242 F.2d 156.

Brown was an inevitable, predictable extension of *Sweat v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, and *McLaurin v. Oklahoma State Regents*, 1950, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149.[72] Those cases involved separate but equal or identical graduate facilities. Factors "incapable of objective measurement" but crucial to a good graduate education were not available to segregated Negroes. These were the intangible factors that prevented the Negro graduate students from having normal contacts and association wtith white students. Apartheid made the two groups unequal. In *Brown I* these same intangi-

dealt with only an individual child's right to be admitted to a particular school on a non-racial basis. And it is also true, as the second Brown opinion pointed out, that courts must bear in mind the 'personal interest' of the plaintiffs. In this sense, the Brown cases held that the law requires non-discrimination as to the individual, not integration. But when a statute has a statewide discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation." Bush v. Orleans Parish School Board, 308 F.2d at 499.

[72] See, for example, Ransmier, The Fourteenth Amendment and the "Separate but Equal" Doctrine, 50 Mich. L. Rev. 203, 238-40 (1951); Roche, Education, Segregation and the Supreme Court—A Political Analysis, 99 U. Pa. L. Rev. 949 (1951); Taylor, The Demise of Race Restrictions in Graduate Education, 1 Duke B. Jour. 135 (1951); Note, 26 St. John's L. Rev. 123 (1951).

bles were found "to apply with added force to children in grade and high schools"; educational opportunity in public schools must be made available to all on equal terms.

The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision.[73] So construed, the way would be open for proponents of the status quo to attempt to show, on the facts, that integration may be harmful or the lesser of two evils. Indeed that narrow view of *Brown I* has led several district courts

[73] Professor Edmund Cahn characterized as a "myth" the notion that the Brown decision was "sociological" rather than "legal". Cahn, Jurisprudence, 31 N.Y.U. L. Rev. 182 (1956); Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955). "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. . . . Heretofore, no government official has contended that he could deny equal protection with impunity unless the complaining parties offered competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage. The right to equal protection has not been subjected to any such proviso." Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157, 158, 168 (1955). Professor Black has said: "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense." Black, The Lawfulness of the Segregation Decision, 69 Yale L.J. 421, 430 n.25 (1960).

Acceptance of these views is not inconsistent with the continued vitality of the psychological findings in *Brown I*. Indeed, several studies have reinforced those findings. The most recent is the United States Office of Education's "Equality of Educational Opportunity", the two-year study authorized by section 402 of the Civil Rights Act of 1964 to investigate "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions . . . ." 42 U.S.C. § 2000c—1.

into error.[74] We think that the judgment "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed."[75] The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.[76] Classifications based upon race are especially suspect, since they are "odius to a free people".[77] In short, compulsory separation, apartheid, is per se discriminatory against Negroes.

A number of post-*Brown* per curiam decisions not involving education make it clear that the broad dimensions of the rationale are not circumscribed by the necessity of showing *harmful* inequality to the

[74] See Stell v. Savannah-Chatham County Board of Education, S.D.Ga. 1963, 220 F. Supp. 667, rev'd 333 F.2d 55; 255 F.Supp. 84 (1965), appeal pending; 225 F.Supp. 88 (1966), appeal pending. See also Jackson Municipal Separate School District v. Evers, 5 Cir. 1966, 357 F.2d 653.

[75] Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959). Professor Wechsler concluded: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . ." The article started a vigorous debate. See authorities collected in Emmerson and Huber, Political and Civil Rights 1625-1629 (1967). See also Kaplan, Equality in an Unequal World, 61 NW U.L. Rev. 363 (1966).

For discussion of the inherently—arbitrary—classification principle against the principle of equality of educational opportunity, see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concept, 78 Harv. L. Rev. 564, 590-98 (1965).

[76] See Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Kaplan, Segregation Litigation and the Schools—Part I, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964).

[77] Korematsu v. United States, 1944, 323 U. S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194.

individual. In these cases Negroes were separated from whites but were afforded equal or identical facilities. Relying on *Brown*, the Court ordered integration of the facility or activity.[78] See also *Anderson v. Martin*, 1964, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430, 433, holding that compulsory designation of a candidate's race on the ballot is unlawful. The designation placed "the power of the State behind a racial classification that induces racial prejudice at the polls."

Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884, provides further evidence of the breadth of the right recognized in *Brown*. There, because the case concerned the District of Columbia, the Court had to rely on the due process clause of the Fifth Amendment instead of the equal protection clause of the Fourteenth Amendment. Going beyond any question of psychological harm or of the denial of equal educational opportunities to the individual, the Court concluded that racial classifications in public education are so unreasonable and arbitrary as to violate due process:[79]

[78] E.g., Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (court-rooms); State Athletic Comm'n v. Dorsey, 395 U.S. 533 (1959) (athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); Gayle v. Browder, 352 U.S. 903 (intrastate busses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses). Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (municipal amphitheater). For lower court decisions to the same effect, see cases collected in Emmerson and Huber, Political and Civil Rights in the United States 1678 (1967).

[79] See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150, 155 (1955). Cf. Antieau, Equal Protection Outside the Clause, 40 Cal. L. Rev. 362, 364 (1954); Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 27-28 (1959).

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. *Segregation in public education is not reasonably related to any proper governmental objective,* and thus it imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty." 347 U. S. at 498. (Emphasis added.)

As in the jury exclusion cases, when the classification is not "reasonably related to any proper governmental objective" equal protection and due process merge.

If *Brown* has only the narrow meaning *Briggs* gives it, the system of state-sanctioned segregated schools will continue indefinitely with only a little token desegregation. White school boards, almost universal in this circuit, will be able to continue to say that their constitutional duty ends when they provide relief to the particular Negro children who, as individuals, claim their personal right to be admitted to white schools. If the *Briggs* thinking should prevail, the dual system will, for all practical purposes, be maintained: white school officials in most key positions at the state and county levels; Negro faculties in Negro schools, white faculties in white schools; no white children or only a few white children of way-out parents in Negro schools; a few Negroes in some white schools; at best, tokenism in certain school districts.

Brown's broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer "beings of an inferior race"—the *Dred Scott* article of faith—Negroes too are part of "the people of the United States".

A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The States owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the *Civil Rights Cases* (1883), 109 U. S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship.*

B. The factual situation dealt with in *Bell v. School City of Gary*, N. D. Ind. 1963, 213 F. Supp. 819, *aff'd* 7 Cir. 1963, 324 F.2d 209, *cert. den'd* 377 U. S. 924 (1964) is not the situation the Supreme Court had before it in *Brown* or that we deal with in this circuit. *Brown* dealt with state-imposed segregation based on dual attendance zones. *Bell* involved nonracially motivated de facto segregation in a school system based on the neighborhood single zone system. In *Bell* the plaintiffs alleged that the Gary School Board had deliberately gerrymandered school attendance zones to achieve a segregated school system in violation of its "duty to provide and maintain a racially integrated system". On the showing that the students were assigned and boundary lines drawn based upon reasonable nonracial criteria, the court held that the school board did not deliberately segregate the races; the racial balance was attributable to geographic and housing patterns. The court analyzed the problem in terms of state action rather than in terms of the Negroes' right to equal educational opportunities. Finding no state action the court concluded that *Brown* did not apply. In effect, the court held that de facto segregated neighborhood schools must be accepted. At any rate, the court said, "states do not have an affirmative duty to provide an integrated education". The Seventh Circuit affirmed.

We must assume that Congress was well aware of the fact that *Bell* was concerned with de facto segregated neighborhood schools—only. Notwithstanding the broad language of the opinion relating to the

lack of a duty to integrate, language later frequently quoted by Senator Humphrey and others in the debates on the Civil Rights Act of 1964, Congress went only so far as to prohibit cross-district bussing and cross-district assignment of students.

The facts, as found by the Court in *Bell*, favored the Gary School Board. Other courts, on very similar facts, have decided that there are alternatives to acceptance of the status quo.[80] A commentator on the subject has fairly summed up the cases: "Using *Brown* as a governing principle, racial imbalance caused by racially motivated conduct is clearly invalid. When racial imbalance results fortuitously, there is a split of authority."[81]

[80] "The central constitutional fact is the inadequacy of segregated education. . . . The educational system that is thus compulsory and public afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." Branche v. Board of Education, 204 F.Supp. at 153. See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285, 301 (1965); Fiss, 78 Harv. L. Rev. 564, 609 (1965) (a relative approach); Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis L. Rev. 228, 233-239, 275 (1963); Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353 (1961).

[81] King, Racial Imbalance in the Public Schools, 18 Vand. L. Rev. 1290, 1337 (1965). Webb v. Board of Education of Chicago, N.D.Ill. 1963, 223 F.Supp. 466; Deal v. Cincinnati Board of Education, S.D.Ohio 1965, 244 F.Supp. 572; Lynch v. Kenston School District, N.D.Ohio 1964, 229 F.Supp. 740; Downs v. Board of Education, 10 Cir. 1965, 336 F.2d 988, cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed. 2d 800; and Sealy v. Department of Public Instruction of Pennsylvania, 3 Cir. 1958, 252 F.2d 898, are more or less in agreement with *Bell*. These cases usually rely on the school board's good faith, lack of racial motivation, and the propriety of considering transportation, geography, safety, access roads, and other neutral criteria as rational bases for school districting. Taking the contrary position are: Booker v. Board of Education of Plainfield, 1965, 45 N.J. 161, 212 A.2d 1; Branche v. Hempstead, E.D.N.Y. 1962, 204 F.Supp. 150; Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 229 F.Supp. 709; Barksdale v. Springfield School Committee, D.Mass. 1965, 237

Barksdale v. Springfield School Committee, D. Mass. 1965, 237 F. Supp. 543, similar on the facts to *Bell*, holds squarely contrary to *Bell*:

> "The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963). But that is not the question. *The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.* While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. . . . *This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.*

F.Supp. 543, vacated for other reasons 1 Cir. 1965, 348 F.2d 261; Jackson v. Pasadena City School District, 1962, 59 Cal. 2d 876, 31 Cal. Rept. 606, 382 P.2d 878. School authorities may act to offset racial imbalance: See Addabbo v. Donovan, 256 N.Y.S. 2d 178, aff'd 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. den'd* 382 U.S. 905 (1965). See also Balaban v. Rubin, 248 N.Y.S.2d 574, aff'd 250 N.Y.2d 281, 199 N.E.2d 375 (1964), *cert. den'd* 379 U.S. 881 (1964) (Board may "take into consideration the ethnic composition of the children" before drawing the attendance lines for a new school); Olson v. Board of Education, E.D.N.Y. 1966, 250 F. Supp. 1000 (the Princeton plan—see note 124, infra); Offerman v. Nitkowski, W.D. N.Y. 1965, 248 F.Supp. 129; Guida v. Board of Education of New Haven, 26 Conn. Supp. 121, 213 A.2d 843 (1965); Strippoli v. Bichal, 250 N.Y.S.2d 969, aff'd N.Y.S.2d 84, 209 N.E.2d 123 (1965) (bussing); Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1965); Vetere v. Allen, 258 N.Y. 77, 206 N.E. 2d 174 (1965) (redistricting of attendance zone approved because "racial balance is essential to a sound education"); Van Bierkom v. Donovan, 1965, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503.

> . . . I cannot accept the view in *Bell* that only forced segregation is incompatible with the requirements of the Fourteenth Amendment, *nor do I find meaningful the statement that '[t]he Constitution . . . does not require integration. It merely forbids discrimination.'* 324 F.2d at 213. . . . ¶ This court recognizes and reiterates that the problem of racial concentration is an educational, as well as constitutional, problem and, therefore, orders the defendants to present a plan no later than April 30, 1965, *to eliminate to the fullest extent possible* racial concentration in its elementary and junior high schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." (Emphasis added.)

"In short, *Barksdale* [does not analyze *Brown*] in terms of propriety of school board action, but proceeds in terms of a right on the part of Negro students to an equal educational opportunity, which in light of the ruling in *Brown* that separate schools are inherently unequal, must perforce be a right to an integrated educational setting."[32] On appeal, the First Circuit accepted the district court's findings of fact but vacated the order with directions to dismiss without prejudice because the school board, on its own

[32] Gilmor and Gosule, Duty to Integrate Public Schools? Some Judicial Responses and a Statute, 46 Bost. U. L. Rev. 45, 57 (1966).

initiative, had taken action identical with the court-ordered action. 348 F.2d 261. The Court noted a difference between "the seeming absolutism" of the opinion and the less sweeping order "to eliminate [segregation] to the fullest extent possible . . . within the framework of effective educational procedures".[83] Taking both opinions together, they recognize that "the state would not be permitted to ignore the problem of de facto segregation. The holding in *Brown*, unexplained by its underlying reasoning, requires no more than the decision in *Bell*, but when illuminated by the reasoning, it permits the result in *Barksdale* and may require that result."[84] At the very least, as the *Barksdale* court saw it, there is a duty to integrate in the sense that integration is an educational goal to be given a high, high priority among the various considerations involved in the proper administration of a system beset with de facto segregated schools.

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[83] The First Circuit construed the court's order as not calling for "an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs." At the same time, the Court said: "Rather we take it to determine that . . . racial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the defendants consider their special problems along with all other relevant factors when making relevant decisions." Springfield School Committee v. Barksdale, 1965, 348 F.2d 261, 264.

[84] Gillmor and Gosule supra note 82, at 64. Compare the statement of policy in the Massachusetts statute, An Act Providing for the Elimination of Racial Imbalance in the Public Schools (Mass. Acts. 1965, ch. 651):

> It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

The statute was enacted a month after *Barksdale* was decided.

Although *Brown* points toward the existence of a duty to integrate de facto segregated schools,[85] the holding in *Brown*, unlike the holding in *Bell* but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system.[86] Segregation resulting from racially motivated gerryman-

[85] "Some of the Supreme Court's language in *Brown* can apply to this type of segregation as well as to that before the Court, since this type of imbalance may also 'generate a feeling of inferiority as to [the Negro children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' Thus, if one believes that the basis of the *Brown* decision was the Court's finding that separate schools were unconstitutional simply because they bred a feeling of inferiority in the Negro, one must also believe that the neighborhood school must also be unconstitutional if it breeds the same feeling of inferiority." Kaplan, Segregation Litigation and the Schools—Part 1, The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964). "Necessarily implied in [Brown's] . . . proscription of segregated education was the positive duty of eliminating it." Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F. Supp. 181, 193, aff'd 294 F.2d 36, *cert. denied* 368 U.S. 940.

[86] See Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, cert. den'd 350 U.S. 1000 (1956). Cf. Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

dering is properly characterized as "de jure" segregation. See *Taylor v. Board of Education of the City of New Rochelle,* S.D.N.Y. 1961, 191 F. Supp. 181.[87] The courts have had the power to deal with this situation since *Brown I.* In *Holland v. Board of Public Instruction of Palm Beach County,* 5 Cir. 1958, 258 F.2d 730, although there was no evidence of gerrymandering as such, the court found that the board "maintained and enforced" a completely segregated system by using the neighborhood plan to take advantage of racial residential patterns. See also *Evans v. Buchanan,* D.Del. 1962, 207 F. Supp. 820, where, in spite of a genuflexion in the direction of *Briggs,* the Court found that there was gerrymandering of school districts superimposed on a pre-*Brown* policy of segregation.

C. The defendants err in their contention that the HEW and the courts cannot take race into consideration in establishing standards for desegregation "The Constitution is not this color-blind."[88]

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection

[87] Modified plan approved, 195 F.Supp. 231, *aff'd* 2 Cir. 1961, 294 F.2d 36, cert. den'd 368 U.S. 940 (1961). See Kaplan, Segregation Litigation and the Schools—Part 1; The New Rochelle Experience, 58 NW.U. L. Rev. 1 (1964). Jackson v. School Board of the City of Lynchburg, W.D. Va. 1962, 203 F.Supp. 701; Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 244 F.Supp. 971; and Swann v. Charlotte-Mecklenburg Board of Education, W.D.N.C. 1965, 243 F.Supp. 667, followed *Taylor* on the unconstitutionality of racial gerrymandering. See also Jackson v. Pasadena City School District, 1963, 59 Cal.2d 876, 382 P.2d 878; Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, *cert. den'd* 350 U.S. 106 (1956); Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323.

[88] Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F.Supp. 181, 196, *aff'd* 294 F.2d 36 (Kaufman, J.).

clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. For example, jury venires must represent a cross-section of the community. *Strauder v. West Virginia*, 1880, 100 U.S. 303, 25 L.Ed. 664. The jury commissioners therefore must have a "conscious awareness of race in extinguishing racial discrimination in jury service". *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1. Similarly, in voter registration cases we have used the "freezing principle" to justify enjoining the use of a constitutional statute where, in effect, the statute would perpetuate past racial discrimination against Negroes. *United States v. Louisiana*, E.D. La. 1963, 225 F.Supp. 353, aff'd 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 817. "[I]t is unrealistic to suppose that the evils of decades of flagrant race discrimination can be overcome by purging registration rolls of white voters. . . . [U]nless there is some appropriate way to equalize the present with the past, the injunctive prohibitions even in the most stringent, emphatic, mandatory terms prohibiting discrimination in the future, continues for many years a structure committing effectual political power to the already registered whites while excluding Negroes from this vital activity of citizenship." *United States v. Ward*, 5 Cir. 1965, 349 F.2d 795, 802. "An appropriate remedy . . . should undo the results of past discrimination as well

as prevent future inequality of treatment." *United States v. Duke,* 5 Cir. 1964, 332 F.2d 759, 768. If the Constitution were absolutely color-blind, consideration of race in the census and in adoption proceedings would be unconstitutional.

Here race is relevant,[89] because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race. School officials have to know the racial composition of their school populations and the racial distribution within the school district. The Courts and HEW cannot measure officials' good faith or progress without taking race into account. "When racial imbalance infects a public school system, there is simply no way to alleviate it without consideration of race. . . . There is no constitutional right to have an inequality

[89] "The justification for the school board's incorporation of racial distinctions in its correctional scheme is that race is a relevant characteristic, given the school board's purpose, which is to avoid psychological injury to the Negro child, break down social barriers, and mitigate the academic inadequacy of the imbalanced schools. Of course, it might be argued that many of the evils the school board attempts to eliminate when it takes correctional steps are not attributable to the race of the individuals within the imbalanced school, but instead are attributable to their social class. Yet, certain of these evils are uniquely related to the fact that the imbalance is a racial one; namely, those attributable to the personal impact of the imbalance on the Negro. Moreover, most Negroes in the ghetto, and hence attending an imbalanced school, are members of the lowest economic class, and thus the board's remedial measures will tend to cure the social imbalance as well." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 577-78 (1965).

perpetuated."[20] Judge Sobeloff's answer in *Wanner v. County School Board of Arlington County*, 4 Cir. 1966, 357 F.2d 452, 454-55, is our answer in this case:

> "If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances. . . . There is no legally protected vested interest in segregation. If there were, then Brown v. Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it."

[20] Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 16 West. Res. L. Rev. 478, 489 (1965).

D. Under *Briggs's* blessing, school boards throughout this circuit first declined to take any affirmative action that might be considered a move toward integration. Later, they embraced the Pupil Placement Laws as likely to lead to no more than a little token desegregation. Now they turn to freedom of choice plans supervised by the district courts. As the defendants construe and administer these plans, without the aid of HEW standards there is little prospect of the plans' ever undoing past discrimination or of coming close to the goal of equal educational opportunities. Moreover, freedom of choice, as now adminstered, necessarily promotes resegregation. The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system—lock, stock, and barrel.

If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966 this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the wavy fore-image of the Future.

IV.

We turn now to the specific provisions of the Civil Rights Act on which the defendants rely to show that HEW violates the Congressional intent. These provisions are the amendments to Title IV and VI added in the Senate. The legislative history of these amend-

ments is sparse and less authoritative than usual because of the lack of committee reports on the amended version of the bill.

A. Section 401(b) defines desegregation:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The affirmative portion of this definition, down to the "but" clause, describes the assignment provision necessary in a plan for conversion of a de jure dual system to a unitary, integrated system. The negative portion, starting with "but", excludes assignment to overcome racial imbalance, that is, acts to overcome de facto segregation. As used in the Act, therefore, "desegregation" refers only to the disestablishment of segregation in de jure segregated schools. Even if a broader meaning should be given to "assignment . . . to overcome racial imbalance", Section 401 would not mean that such assignments are unlawful:

> "The intent of the statute is that no funds and no technical assistance will be given by the United States Commissioner of Education with respect to plans for the assignment of students to public schools in order to over-

> come racial imbalance. The statute may not be interpreted to mean that such assignment is illegal or that reasonable integration efforts are arbitrary or unlawful."[91]

The prohibition against assignment of students to overcome racial imbalance was added as an amendment during the debates in the House to achieve the same result as the anti-bussing provision in section 407. Some of the difficulty in understanding the Act and its legislative history arises from the statute's use of the undefined term "racial imbalance". It is clear however from the hearings and debates that Congress equated the term, as do the commentators, with "de facto segregation" that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area.[92] Thus, Congressman William Cramer

[91] Addabbo v. Donovan, 22 App. Div.2d 383, 256 N.Y.S.2d 178, 184, (2d Dept. 1965), aff'd, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), cert. denied, 382 U.S. 905 (1965).

[92] For example, "Racial imbalance" and "de facto segregation" are "used synonymously . . . [to] refer to a situation where a school is predominantly composed of Negro students not as a result of state action but rather as the end product of segregated housing and adherence to the neighborhood school plan." Gillmor and Gosule, 46 Boston U. L. Rev. 45, 46 (1966). The term "de facto segregation" has become accepted as denoting non-racially motivated separation of the races as opposed to "de jure segregation" denoting deliberate separation of the races by law. Since segregation is unconstitutional, each is a contradiction in terms. One student of the problem has pointed out, "The term *de facto* segregation makes the racially imbalanced school appear . . . [to be] the Northern counterpart of segregated education under Jim Crow laws . . . . As such the term distorts reality and paralyzes thought. [Racial] imbalance is frequently labeled 'de facto' segregation to suggest that the requisite governmental involvement cannot be found." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 566, 584 (1965). Another has said, "As a more accurate term, racial im-

who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require bussing to overcome de facto segregation. In explaining the amendment, he said:

> "In the hearings before the committee I raised questions on 'racial imbalance' and in the sub-committee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words '*racial imbalance*' proposed by the administration. ¶ The purpose is *to prevent any semblance of congressional acceptance or approval of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' *any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*"

The neighborhood school system is rooted deeply in American culture.[93] Whether its continued use is

balance will be used to denote fortuitous racial separation in the public schools". King, Racial Imbalance in the Public Schools: Constitutional Dimensions and Judicial Response, 18 Vand. L. Rev. 1290, 1291 (1965).

"*De facto* segregation has become the short way of describing the existing situation in northern cities. . . . a school system which is marked by a very high proportion of Negroes in some of its schools, and few or none in others, but in which this separation has taken place without the compulsion of a state law or officially announced policy requiring that Negro and white children be placed in separate schools." Hyman and Newhouse, Desegregation of the Schools: The Present Legal Situation, 14 Buff. L. Rev. 208, 221 (1964). See also Carter, De Facto Segregation, 16 West. Res. L. Rev. 502, 503 (1965).

[93] The rationale of the neighborhood school system is that the school serves as the educational, recreational, and cultural center of the community. See Hansen, The Role of Educators, 34 Notre Dame L. Rev. 652, 654 (1959). Proponents of the view that neighborhood schools may become so racially imbalanced as to

constitutional when it leads to grossly imbalanced schools is a question some day to be answered by the Supreme Court, but that question is not present in any of the cases before this Court. As noted in the previous section of this opinion, we have many instances of a heavy concentration of Negroes or whites in certain areas, but always that type of imbalance has been superimposed on total school separation. And always the separation originally was racially motivated and sanctioned by law in a system based on two schools within a neighborhood or overlapping neighborhoods, each school serving a different race. The situations have some similarity but they have different origins, create different problems, and require different corrective action.[94]

In the 1964 Act (and again in 1966 during consideration of amendments to the Elementary and Secondary Education Act of 1965) Congress, within the con-

require affirmative corrective action point out: "The modern-day neighborhood school cannot be equated with the common school of yesteryear—the latter constitutes America's ideal of a democratic institution—a single structure serving a heterogeneous community in which children of varied racial, cultural, religious, and socio-economic backgrounds were taught together—the proverbial melting pot. Because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage." Carter, De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented, 16 West. Res. L. Rev. 502, 507 (1965). See also Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U. L. J. 228, 252-56 (1963).

[94] For some idea of the number and complexity of the administrative problems school officials face in dealing with de facto segregation, see Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 NW. U. L. Rev. 157, 182-186 (1963). Professor Kaplan quotes at length excerpts from the testimony in *Bell*.

text of debates on aid to de facto segregated schools declined to decide just what should be done about imbalanced neighborhood schools.[94a] The legislative solution, if there is one to this problem, will require a carefully conceived and thoroughly debated comprehensive statute. In the 1964 Act Congress simply directed that the federal assistance provided in Title IV, §403-5 was not to be used for developing plans to assign pupils to overcome racial imbalance.[95] Similarly, Congress withheld authorizing the Attorney General, in school desegregation actions, to ask for a court order calling for bussing pupils from one school to another to "achieve a racial balance".[96]

[94a] The question of providing special, ear-marked federal funds for school districts that were trying to correct imbalanced neighborhood schools came up again in connection with the 1966 amendments to the Elementary and Secondary Education Act of 1965. The House committee recommended special priority for applications under Title III of the Act from local school districts which sought help with problems of overcrowding, obsolescence, or racial imbalance. The House withdrew priority for dealing with problems of racial imbalance and added an amendment to Section 604 of the Act to the effect that nothing in the Act be construed to "require the assignment or transportation of students or teachers in order to overcome racial imbalance." The Senate went along with both actions. The debate makes clear that Congress was once again talking about racial imbalance in the context of de facto, not de jure, school segregation. See particularly Congressional Record, October 6, 1966, pp. 24538-9; 24541-3. See also 1966 U.S. Code Congressional and Administrative News, No. 11, pp. 5089-90, for language in House committee report recommending the priority position of applications to deal with racial imbalance.

[95] Congressman Cramer's amendment.

[96] This restriction appears in §407 of the Act. In its context it seems clearly to restrict the Attorney General to requesting only such relief as is constitutionally compelled. In other words, the Act is *not* to be construed as authorizing a statutory duty to reduce imbalance by bussing. Certainly the language of §407 does not call for a construction that prohibits a court order directing that school boards abandon racially discriminatory practices which violate the Constitution. Nor does it suggest that the Attorney General is precluded from requesting court orders to end racial imbalance resulting from unconstitutional practices.

B. Section 407(a)(2) of Title IV authorizing the Attorney General to file suit to desegregate, contains the "anti-bussing" proviso:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial compliance with constitutional standards."

First, it should be noted that the prohibition applies only to transportation; and only to transportation across school lines to achieve racial balance. The furnishing of transportation as part of a freedom of choice plan is not prohibited. Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. It is not contended in the instant cases that the Act conferred new authority on the courts. And this Court has not looked to the Act as a grant of new judicial authority.

Section 407(a)(2) might be read as applying only to orders issued in suits filed by the Attorney General under Title IV. However, Senator, now Vice President Humphrey, Floor Manager in the Senate, said it was his understanding that the provision applied to the entire bill. In particular, he said that it applies to any refusal or termination of federal assistance under Title VI since the procedure for doing so requires an order approved by the President. Senator Humphrey explained:

"This addition seeks simply to *preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools,* and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools. ¶ Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.' ¶ Thus, classification along *bona fide neighborhood school lines,* or *for any other legitimate reason* which local school boards might see fit to adopt, would not be affected by Title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws." (Emphasis added.)

Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation. Senator Byrd (West Virginia) asked Senator Humphrey would he give assurance "that under Title VI school children may not be bussed from one end of the community to another end of the community at taxpayers' expense to relieve so-called racial imbalance in the schools". Senator Humphrey replied:

> "I do . . . That language is to be found in Title IV. The provision [§407(a)(2)] merely quotes the substance of a recent court decision which I have with me, and which I desire to include in the Record today, the so-called Gary case."

Senator Humphrey explained:

> "Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, it was decided to write the *thrust of the court's opinion* into the proposed substitute." (Emphasis added.)

The thrust of the *Gary* case (*Bell*) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing. Thus, continuing his explanation, Senator Humphrey said:

> "The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect*

deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (Emphasis added.)

C. Section 601 states the general purpose of Title VI of the Act:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, *be denied the benefits of,* or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

This is a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful. Children attending schools which receive federal assistance are of course among the beneficiaries. In the House, Congressman Celler explained:

"The legality is based on the general power of Congress to apply reasonable conditions. . . ¶In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it pro-

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> vides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination."

In the Senate, Senator Javits, an assistant floor-manager, expressed concern as to the clarity of the statement of policy:

> "I ask the Senator whether we now have a clear understanding that if title VI shall be enacted as it is now proposed, the express and clear policy of Congress against aiding discrimination will prevail . . ."

Senator Humphrey answered:

> "Some Federal agencies appear to have been reluctant to act in this area. Title VI will require them to act. Its enactment will thus serve to insure uniformity and permanence to the nondiscrimination policy."[97]

D. Section 604 of the Act, 42 U.S.C. § 2000d—3 is the section the defendants principally rely upon and the section most misunderstood.[97] It provides:

> "Nothing contained in this title shall be construed to authorize action under this title by any department or agency *with respect to any employment practice of any employer* employment agency, or labor organization ex-

[97] See Hearings Before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Rep., 826, Sept. 29-30, 1966, 24-26, 37-40.

> cept where a primary objective of the Federal financial assistance is to provide employment." (Emphasis added.)

The defendants contend that this section bars any action requiring desegregation of faculties and school personnel.

Section 604 was not a part of the original House bill. Senator Humphrey, while introducing the Act explained: "[The] Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Braxton v. Board of Public Instruction of Duval County*, 5 Cir. 1964, 326 F.2d 616." 110 Cong.Rec. p. 6345. That was in March 1964. In June 1964, in explaining the amendments, Senator Humphrey said, "This provision is in line with the provisions of section 602[98] and serves to spell out more precisely the declared scope of coverage of the title." In the same speech he stated (110 C.R. 12714): "We have made no changes of substance in Title VI." This explanation plainly indicates that the amendment was not intended as a statutory bar to faculty integration in schools receiving federal aid.

However, in the interval between these two explanations the Attorney General, in response to a letter from Senator Cooper, stated that Section 602 would not apply to federally aided employers who discriminated in employment practices: "Title VI is limited . . . to discrimination against the beneficiaries of

[98] See footnote 19.

federal assistance programs. . . . Where, however, employees are the intended beneficiaries of a program, Title VI would apply".[99] He gave as an example accelerated public works programs. It was after the receipt of the Attorney General's letter that the amended Senate bill was passed. The school boards argue therefore that Section 604 was enacted, because of the Attorney General's interpretation, to exclude interference with employment practices of schools.

In its broadest application this argument would allow racial discrimination in the hiring, discharge, and assignment of teachers. In its narrowest application this argument would allow discrimination in hiring and discharging but not in assigning teachers, an inexplicable anomaly.[100] There is no merit to this argument. Section 604 and the Attorney General's letter are not inconsistent, since under Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers.

After Section 601 was proposed, additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the

[99] BNA Operations Manual, The Civil Rights Act of 1964, p. 289.
[100] See Note, Desegregation of Public School Activities, 51 Iowa L. Rev. 681, 690-96 (1966).

statute. See Hearings, H.R. Comm. on Rules, H. R. 7152, 88th Cong., 2d Sess. (1964), pp. 94, 226; 110 C.R. 6544-46 (Senator Humphrey). For example, there was a serious question as to whether the bill would forbid a farmer who was receiving benefits under the Agricultural Adjustment Act from discriminating upon the basis of race in the selection of his employees. Hearings, H.R. Comm. on Rules, H. R. 7152, 88 Cong., 2d Sess., 1964, p. 94, 110 C.R. 6545 (Senator Humphrey). The addition of Section 604 to the bill as originally proposed clearly excluded the application of the Act to this type of situation. Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole.[101]

Collaterally to their argument on Section 604, the defendants cite Section 701(b) of Title VII, covering Equal Employment Opportunities, which specifically excepts a "state or political subdivision thereof". This section has no application to schools. Section 701(b), defines "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees. . . ."

[101] Senator Humphrey explained: The "elimination of racial discrimination in employment or assignment of teachers . . . does not mean that Title VI would authorize a federal official to prescribe [particular] pupil assignments, or to select a [particular] faculty as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers . . ." 110 Cong. Rec. 6545.

Section 604 was never intended as a limitation on desegregation of schools. If the defendants' view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. As the District Court for the Western District of Virginia put it in *Brown v. County School Board of Frederick County*, 1965, 245 F. Supp. 549, 560:

> "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters."

As far as possible federal courts must carry out congressional policy. But we must not overlook the fact that "we deal here with constitutional rights and not with those established by statute".[103] The right of Negro students to be free from racial discrimination in the form of a segregated faculty is part of their broader right to equal educational opportunities. The "mandate of *Brown* . . . forbids the [discriminatory] consideration of race in faculty selection just as it forbids it in pupil placement." *Chambers v. Hendersonville City Board of Education*, 4 Cir. 1966, 364 F.2d 189.

In *Brown II* the Supreme Court specifically referred to the reallocation of staff as one of the reasons permitting desegregation "with all deliberate speed".

[103] Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770, 784.

"In determining the additional time necessary . . . courts may consider problems related to administration, arising from . . . *personnel*. . . ." (Emphasis added.) 349 U.S. at 301. For ten years, however, this Court and other circuit courts[108] had approved district courts' postponing hearings on faculty desegregation. *Bradley v. School Board of the City of Richmond*, 1965, 382 U. S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 put an end to this practice. In *Bradley* the Supreme Court held that faculty segregation had a direct impact on desegregation plans. The court summarily remanded the case to the district court holding that it was improper for that court to approve a desegregation plan without considering, at a full evidentiary hearing, the impact of faculty allocation on a racial basis. The Court said, "[There is] no merit to the suggestion that relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans are entirely speculative." Moreover, "Delays in desegregation of school systems are no longer tolerable." 387 U.S. at 105. In *Rogers v. Paul*, 1965, 382 U.S. 198, 200, 86 S.Ct. 358, 15 L.Ed.2d 265, the Supreme Court held that Negro students in grades not yet desegregated were entitled to an immediate transfer to a white high school. They "plainly had standing" to sue on two theories: (1) "that *racial allocation of faculty denies them equality of educational opportunity without regard to* segregation of pupils, and (2) that it renders inadequate an otherwise constitutional pupil desegregation

[108] For example, Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 345 F.2d 225, 229; Calhoun v. Latimer, 5 Cir. 1963, 321 F.2d 302, 307; Bradley v. School Board of the City of Richmond, 4 Cir. 1965, 345 F.2d 310, 320.

plan soon to be applied to their grades." In *Singleton II* this Court, relying on *Bradley*, held that it was "essential" for the Jackson schools to make an "adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." 355 F.2d at 870.

In a recent decision of the Eighth Circuit, *Clark v. Board of Education of Little Rock School District*, No. 18,368, December 15, 1966, the Court required a "positive program aimed at ending in the near future the segregation of the teaching and operating staff". The Court stated: "We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . It is also clear that the time for delay is past. The desegregation of the teaching staff should have begun many years ago. At this point the Board is going to have to take accelerated and positive action to end discriminatory practices in staff assignment and recruitment."

In *Braxton v. Board of Public Instruction of Duval County*, 1964, 326 F.2d 616, 620, *cert. denied* 377 U. S. 924, the case cited by Senator Humphrey, this Court affirmed an order of the district court prohibiting assignment of "teachers *and other personnel* . . . on a racially segregated basis." In *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770, 778, the Court said:

"It is our firm conclusion that the reach of the Brown decisions, although they specifically concerned only pupil discrimination, clearly extends to the proscription of the employment and assignment of public school teachers on a racial basis. Cf. United Public Workers v. Mitchell, 330 U. S. 75, 100 (1947); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952). See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U. S. 714, 721 (1963). This is particularly evident from the Supreme Court's positive indications that non-discriminatory allocation of faculty is indispensable to the validity of a desegregation plan. Bradley v. School Board of the City of Richmond, supra; Rogers v. Paul, supra. This court has already said, 'Such discrimination [failure to integrate the teaching staff] is proscribed by *Brown* and also the Civil Rights Act of 1964 and the regulations promulgated thereunder'. Kemp v. Beasley, supra, p. 22 of 352 F.2d."

In *Wheeler v. Durham City Board of Education*, 4 Cir. 1966, 363 F.2d 738, 740 the Court stated: "We read [*Bradley*] as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown v. Board of Education*, 347 U.S. 483. Hence no proof of the relationship of faculty allocation and pupil assignment was required here. The only factual

issue is whether race was a factor entering into the employment and placement of teachers." In *Wright v. County School Board of Greensville County*, E.D. Va. 1966, 252 F. Supp. 378, 384, holding that a faculty desegregation provision approved by the Commissioner of Education was not sufficient, the court said:

> "The primary responsibility for the selection of means to achieve employment and assignment of staff on a nonracial basis rests with the school board. . . . Several principles must be observed by the board. Token assignments will not suffice. The elimination of a racial basis for the employment and assignment of staff must be achieved at the earliest practicable date. The plan must contain well defined procedures which will be put into effect on definite dates. The board will be allowed ninety days to submit amendments to its plan dealing with staff employment and assignment practices."

In *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F. Supp. 239, 247, the court held that free choice plans require faculty integration:

> "Freedom of choice, in other words, does not mean a choice between a clearly delineated 'Negro school' (having an all-Negro faculty and staff) and a 'white school' (with all-white faculty and staff). School authorities who have heretofore operated dual school systems for Negroes and whites must assume the duty of eliminating the effects of dualism before a

> freedom of choice plan can be superimposed upon the pre-existing situation and approved as a final plan of desegregation. It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. : . . The duty rests with the School Board to overcome the discrimination of the past, and the long-established image of the 'Negro school' can be overcome under freedom of choice only by the presence of an integrated faculty."

See also *Dowell v. School Board of Oklahoma City Public Schools*, W.D. Okla. 1965, 244 F.Supp. 971, 977, and *Franklin v. County School Board of Giles County*, 4 Cir. 1966, 360 F.2d 325.

We cannot impute to Congress an intention to repudiate Senator Humphrey's explanation of Section 604 and to change the substance of Title VI, tearing the vitals from the statutory objective. Integration of faculty is indispensable to the success of desegregation plan. Nor can we impute to Congress the intention to license, unconstitutionally, discrimination in the employment and assignment of teachers, a conspicuous badge of de jure segregated schools.[104]

[104] Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192, involved the problem of surplus Negro teachers who lost their jobs when an all Negro school was abolished. The School Board treated them as new applicants. The court held that this was discriminatory. Speaking for the majority, Judge Bell said: "First, the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of

E. As we construe the Act and its legislative history, especially the sponsors' reliance on *Bell*, Congress, because of its hands-off attitude on bona fide neighborhood school systems, qualified its broad policy of nondiscrimination by precluding HEW's requiring the bussing of children across district lines or requiring compulsory placement of children in schools to strike a balance when the imbalance results from de facto, that is, non-racially motivated segregation. As Congressman Cramer said, "De facto segregation is racial imbalance". But *there is nothing in the language of the Act or in the legislative history that equates corrective acts to desegregate or to integrate a dual school system initially based on de jure segregation with acts to bring about a racial balance in a system based on bona fide neighborhood schools.*

Congress recognized that HEW's requirements for qualifying for financial assistance are one thing and the courts' constitutional and judicial responsibilities are something else again. The Act states, therefore, that it did not enlarge the courts' existing powers to ensure compliance with constitutional standards. *But neither did it reduce the courts' power.*

V.

The HEW Guidelines agree with decisions of this circuit and of the similarly situated Fourth and

Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177, (4 Cir. 1966) . . ."

Eighth Circuits. And *they stay within the Congressional mandate.* There is no cross-district or cross-town bussing requirement. There is no provision requiring school authorities to place white children in Negro schools or Negro children in white schools for the purpose of striking a racial balance in a school or school district proportionate to the racial population of the community or school district.[105] The provision referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation rather than a firm requirement that must be met.[106] See footnotes 105 and 106.

[105] The present Commissioner of Education, Harold Howe II, in a congressional hearing declared:

> "The guidelines do not mention and do not require 'racial balance' or the correction of racial 'imbalance.' Nor have we in the administration of our obligations under Title VI sought to establish 'racial balance.' They deal only with desegregation plans designed to eliminate the dual school systems for whites and Negroes, systems being operated in violation of the 1954 Supreme Court ruling. . . . Racial imbalance certainly means the notion of trying to establish some proportion of youngsters that must be in each and every school. We are not about such an enterprise. We are trying to give the effect of free choices to enter into, or to allow free choices in having pupils enter into whatever school they may wish to attend. I do not believe that free choice plans were ever intended by the courts or by us to be an arrangement whereby the dual school system could continue without support of law. But rather an arrangement by which over a period of time we would gradually have one school system rather than two separate school systems. I do not see that we are engaged in any way in establishing procedures for balance." Hearings before the Committee on Rules, House of Representatives, 89th Cong. 2nd Sess., on H. Res. 26, Sept. 29-30, 1966, p. 32-34.

See also footnote 106.

[106] In a letter addressed to Members of Congress and Governors, dated April 9, 1966, and given wide publicity in the press, John W. Gardner, Secretary of Health, Education and Welfare explained the purpose of the percentages:

> "The second area of concern involves the percentages mentioned in the guidelines. Some have contended that this portion of the guidelines imposes a formula of 'racial balance.'

Good faith in compliance should be measured by performance, not promises.

In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools. This Court has frequently relied on percentages in jury ex-

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This contention misconceives the purpose of the percentages. The prevailing method of desegregation is what is called the 'free choice' plan. Under such a plan, students select their schools instead of being assigned to them on a geographic basis. Courts have expressly conditioned their approval of such plans on affirmative action by school boards to insure that 'free choice' actually exists. It is our responsibility to review such plans to insure that the choice is, in fact, free and to indicate to school districts what procedures should be used to assure true freedom of choice.

In seeking appropriate criteria to guide us in review of free choice plans, we have adopted the objective criteria applied by the courts in similar situations. One such criterion is the distribution of students by race in the various schools of a system after the students have made their choices. If substantial numbers of Negro children choose and go to previously all-white schools, the choice system is clearly operating freely. If few or none choose to do so in a community where there has been a pattern of segregation, then it is appropriate that the free choice plan be reviewed and other factors considered to determine whether the system is operating freely.

With more than 2000 separate districts to consider, such percentages are thus an administrative guide which helps us to determine those districts requiring further review. Such review in turn will determine whether or not the freedom of choice plan is in fact working fairly." New York Times, April 12, 1966, page 1.

Printed in Hearings before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Res. 826, Sept. 29-30, 1966, p. 31. Commissioner Howe reaffirmed Secretary Gardner's policies as stated in the letter. See Hearings on H. Res. 326, p. 30-33.

clusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes.[107] Percentages have been used in other civil rights cases.[108] A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system. Thus *Evans v. Buchanan*, D.C. Del. 1962, 207 F. Supp. 820[109] held that this natural inference coupled with the board's possessing the probative facts that might rebut the inference created a presumption that the proposed desegregation plan was unconstitutional.

[107] "Very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish evidence of systematic exclusion of Negroes from jury service." United States ex rel. Seals v. Wiman, 5 Cir. 1962, 304 F.2d 53, 67.

[108] In United States v. Ward, supra at 803, the Court compared the number of Negroes registered with the number of Negroes eligible to vote. A similar practice is used in proving systematic exclusion of Negroes from juries. Cassell v. Texas, 1950, 339 U.S. 282; Avery v. Georgia, 1953, 345 U.S. 559; Smith v. Texas, 1940, 311 U.S. 128. In each instance, percentage tests have been used not as an effort to effect racial balance, but as a means of determining whether a challenged procedure is operating in a way that violates constitutional rights. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

[109] See footnote 58.

The Guidelines were adopted for the entire country. However, they have been formulated in a context sympathetic with local problems. Sections 403-405 of the 1964 Civil Rights Act provide that, upon request, the Commissioner of Education may render technical assistance to public school systems engaged in desegregation. The Commissioner may also establish training institutes to counsel school personnel having educational problems occasioned by desegregation; and the Commissioner may make grants to school boards to defray the costs of providing in-service training on desegregation. In short, the Commissioner may assist those school boards who allege that they will have difficulty complying with the guidelines. When desegregation plans do not meet minimum standards, the school authorities should ask HEW for assistance. And district courts should invite HEW to assist by giving advice on raising the levels of the plans and by helping to coordinate a school's promises with the school's performance. In view of the competent assistance HEW may furnish schools, there is a heavy burden on proponents of the argument that their schools cannot meet HEW standards.

VI.

School authorities in this circuit, with few exceptions, have turned to the "freedom of choice" method for desegregating public schools. The method has serious shortcomings. Indeed, the "slow pace of integration in the Southern and border States is in large measure attributable to the manner in which

free choice plans . . . have operated."[110] When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.

A free choice plan does not abandon geographical criteria, but requires no rigid adherence to attendance zones. Theoretically every child may choose his school, but its effectiveness depends on the availability of open places in balanced schools. Moreover, unless there is some provision to prevent white children transferring out of an imbalanced school this plan will promote resegregation.[111]

[110] Rep. U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, p. 51. "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation." Ibid.

[111] See Goss v. Board of Education, 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, cert. den'd 374 U.S. 827 (1963); Jackson v. School Board of the City of Lynchburg, 4 Cir. 1963, 321 F.2d 230. For discussion of limitations to a free choice plan, see Fiss, Racial Imbalance in the Public Schools, 78 Harv. L. Rev. 563, 572 (1965).

"Under freedom of choice plans, schools tend to retain their racial identification."[112] Such plans require affirmative action by parents and pupils to disestablish the existing system of public schools. In this circuit white students rarely choose to attend schools identified as Negro schools. Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude. New construction and improvements to the Negro school plant attract no white students and diminish Negro motivation to ask for transfer. Nevertheless, the Eighth Circuit has approved freedom of choice plans "as a permissible method at this stage", although recognizing that such a plan "is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of *Brown* and subsequent cases and the legislative declaration of §2000(d) of the Civil Rights Act of 1964."[113] We have said: "At this stage in the history of desegregation in the deep South a 'freedom of choice plan' is an acceptable method for a school board to use in fulfilling its duty to integrate the school system. In the long run, it is hardly possible that schools will be administered on any such haphazard basis". *Singleton II*, 355 F.2d at 71. HEW

[112] Rep. U. S. Comm. on Civ. Rights, Survey of Desegregation in the Southern and Border States, 1965-66, p. 33. The Commission also notes that racial identification of schools as Negro schools is strengthened by: (1) normal school ties; (2) the interest Negro administrators and teachers have in maintaining the dual system (from May 1965 to September 1965, 668 Negro teachers became surplus because of desegregation); (3) some Negro educators are opposed to desegregation, because past economic and cultural deprivation makes Negroes ill prepared to compete with white children in schools.

[113] Kemp v. Beasley, 8 Cir. 1965, 352 F.2d 14, 21.

recognizes freedom of choice as a permissible means of desegregation. See Revised Guidelines, Subpart B, 181.11, and all of Subpart D.

Courts should closely scrutinize all such plans. Freedom of choice plans "may . . . be invalid because the 'freedom of choice' is illusory. The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education." *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F.Supp. 378, 383. In that case the court was concerned that "operation under the plan may show that the transportation policy or the capacity of the schools severely limits freedom of choice, although provisions concerning these phases are valid on their face". In *Lockett v. Board of Education of Muskogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, we were concerned that "proper notice" be given so that "Negro students are afforded a reasonable and conscious opportunity to apply for admission to any school which they are otherwise eligible to attend without regard to race". Also, as Judge Bell, for the Court, pointed out, "a necessary part of the plan is a provision that the dual or biracial school attendance system . . . be abolished." See also *Dowell v. School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971; *Bell v. School Board of City of Staunton*, W.D.Va. 1966, 249 F.Supp. 249; *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F.Supp. 239.

There is much that school authorities should do to meet their responsibilities:

> "[*Brown*] called for responsible public officials to reappraise their thinking and policies, and to make every effort to afford Negroes the more meaningful equality guaranteed them by the Constitution. The Brown decision, in short, was a lesson in democracy, directed to the public at large and more particularly to those responsible for the operation of the schools. It imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered." *Taylor v. Board of Education of the City of New Rochelle*, S.D.N.Y. 1961, 191 F. Supp. 181, 187, aff'd 294 F.2d 36, cert. den'd 368 U.S. 940 (1961).

School officials should consult with Negro and white school authorities before plans are put in final form. They should see that notices of plans and procedures are clear and timely. They should avoid the discriminatory use of tests and the use of birth and health certificates to make transfers difficult. They should eliminate inconvenient or burdensome arrangements for transfer, such as requiring the personal appearance of parents, notarized forms, signatures of both parents, or making forms available at inconvenient times to working people. They should employ forms which do not designate the name of a Negro school as the choice or contain a "waiver" of the "right" to attend white schools. Certainly school officials should not discourage Negro children from en-

rolling in white schools, directly or indirectly, as for example, by advising them that they would not be permitted to engage or would not want to engage in school activities, athletics, the band, clubs, school plays. If transportation is provided for white children, the schedules should be re-routed to provide for Negro children. Overcrowding should not be used as an excuse to avoid transfers of Negro children. In *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, 323, Judges Sobeloff and Bell, concurring, said:

> "A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at best negative, little progress will be made, no matter what form of words may be used."

Freedom of choice means the maximum amount of freedom and clearly understood choice in a bona fide unitary system where schools are not white schools or Negro schools—just schools.

We turn now to a discussion of the specific elements of a freedom of choice plan that make it more than a mere word of promise to the ear.

A. *Speed of Desegregation.* The announced speed of desegregation no longer seems to be a critical issue. The school boards generally concede that by the school year 1967-68 *all* grades should be desegregated.

B. *Mandatory Annual Free Choice.* Underlying and tending to counteract the effectiveness of all the freedom of choice plans before the Court is the initial unconstitutional assignment of all students by race. When the freedom of choice plan is "permissive" or "voluntary" the effect is to superimpose the same old transfer plan on racial assignments and dual zones. We hold that any freedom of choice plan is inadequate if based upon a preliminary system of assignment by race or dual geographic zones. See *Singleton II* and *Lockett v. Board of Education of Muscogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, restating the requirement of *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55 and *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. It is essential that dual or biracial school attendance systems be abolished contemporaneously with the application of a plan to the respective grades reached by it.

In place of permissive freedom of choice there must be a mandatory annual free choice of schools by all students, both white and Negro. "If a child or his parent is to be given a meaningful choice, this choice must be afforded annually." *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22. The initial choice of assignment, within space limitations, should be made by a parent or by a child over fifteen without regard to race. This

mandatory free choice system would govern even the initial assignment of students to the first grade and to kindergarten. At the minimum, a freedom of choice plan should provide that: (1) *all* students in desegregated grades shall have an opportunity to exercise a choice of schools. *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, vacated and remanded, 1965, 382 U.S. 103; (2) where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard, *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55, 65; and (3) when a student fails to exercise his choice, he will be assigned to a school under a uniform non-racial standard, *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22.

C. *Notice.* The notice provisions of the HEW Guidelines are reasonable and should be followed. Where public notice by publication in a newspaper will assure adequate notice, individual notice will not be necessary. Individual notice should be required if notice by publication is likely to be inadequate.

D. *Transfers for Students in Non-desegregated Grades and with Special Needs.* In *Singleton II* we held that children in still-segregated grades in Negro schools "have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race."[114] 355 F.2d at 869. See also

[114] This was not new. In 1957 a district court in Maryland held that stair step plans do not justify excluding a qualified individual, notwithstanding a more gradual schedule applicable to the

Rogers v. Paul, 1965, 382 U. S. 198, 15 L.Ed.2d 265. A transfer provision should be included in the plan. The right to transfer under a state Pupil Placement Law should be regarded as an additional right that takes into consideration criteria irrelevant to the absolute right referred to in *Rogers v. Paul*.

E. *Services, Facilities, Activities, and Programs.* In *Singleton II* we held that there should be no segregation or discrimination in services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled. We have in mind school athletics and inter-scholastic associations of course, but also parents-teachers associations. In order to eliminate any uncertainty on this point, we hold that the plan should contain a statement that there will be no such segregation or discrimination.

F. *School Equalization.* In recent years, as we are all well aware, Southern states have exerted great effort to improve Negro school plants. There are however many old and inferior schools readily identifiable as Negro schools; there are also many superior white schools, in terms of the quality of instruction. A freedom of choice plan will be ineffective if the students cannot choose among schools that are substantially equal. A school plan therefore should provide for

school population generally. Moore v. Board of Education of Harford County, D.Md. 1957, 146 F. Supp. 91 and 152 F.Supp. 114, aff'd sub.nom. Slade v. Board of Education, 4 Cir. 1958, 252 F.2d 191, cert. den'd 357 U.S. 906 (1958). This Court approved such an order in Augustus v. Board of Education, 5 Cir. 1962, 306 F.2d 863.

closing inferior schools and should also include a provision for remedial programs to overcome past inadequacies of all-Negro schools. This will, of course, require the local school authorities and the trial courts to examine carefully local situations and perhaps seek advice from qualified, unbiased authorities in the field.

G. *Scheduled Compliance Reports.* Scheduled compliance reports to the court on the progress of freedom of choice plans are a necessity and of benefit to all the parties. These should be required following the choice period and again after the opening of school. None of the school boards expressly objected to this provision, or one similar to it, and it does not appear onerous.

H. *Desegregation of Faculty and Staff.* The most difficult problem in the desegregation process is the integration of faculties. See Section IV D of this opinion. A recent survey shows that until the 1966-67 session not a single Negro teacher in Alabama, Louisiana, or Mississippi has been assigned to a school where there are white teachers.[115] As evidenced in numerous records, this long continued policy has resulted in inferior Negro teaching and in inferior education of Negroes as a class. Everyone agrees, on principle, that the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrating faculties; teaching is an art. Yet until

[115] See footnote 35. However, the press has carried accounts that progress is being made toward "desegregation of teachers, administrators and other personnel" for 1967-68 in Jackson, Mississippi. See Jackson Clarion Ledger, July 30, 1966, page 1.

school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.[116] The transfer of a few Negro children to a white school does not do away with the dual system. A Negro faculty makes a Negro school; the Negro school continues to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class.[117] To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria. As we pointed out (see Section III C), in fashioning an appropriate remedy tending to undo past discrimination this Court has often taken race into account.

In the past year, district courts have struggled with the problem of framing effective orders for the desegregation of faculty. (1) Some courts have focused upon the specific results to be reached by reassign-

[116] "Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where faculties remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as "white" and "Negro" depending on the color of the teachers." Rep., U.S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 57.

[117] Faculties should be desegregated so that "both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching". Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 219 F. Supp. 427.

ment of teachers previously assigned solely upon the basis of their race. *Dowell v. School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971, *Kier v. County School Board of Augusta County*, W.D.Va. 1966, 249 F. Supp. 239.[118] The orders entered in these cases require the defendant school boards to assign any newly employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in the total teaching staff in the system, or at least, of the particular school level in which they are employed. (2) Other courts have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in *Beckett v. School Board of the City of Norfolk*, Civil Action No. 2214 (E.D.Va., 1966); *Gilliam v. School Board of the City of Hopewell*, Civil Action No. 3554 (E.D.Va. 1966); and *Bradley v. School Board of the City of Richmond*, Civil Action No. 3353 (E.D.Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-

[118] In *Kier* the Court said that duty to desegregrate faculty must be "immediately and squarely met"; there can be no freedom of choice for faculties and administrative staffs by the 1966-67 school year. Insofar as possible, "the percentage of Negro teachers in each school of the system should approximate the percentage of Negro teachers in the entire system for the 1965-66 season". 249 F. Supp. at 22.

employed faculty members in order to facilitate faculty integration. (3) In a third group of cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results, has not been specific regarding the mechanics or the specific results to be achieved. See *Harris v. Bullock County Board of Education*, M.D Ala. 1966, 253 F. Supp. 276; *United States v. Lowndes Board of Education*, Civil Action No. 2328-N (M.D.Ala. 1966); *Carr v. Montgomery County Board of Education*, M.D.Ala. 1966, 253 F. Supp. 306.

We agree with the Eighth Circuit's statement: "The lack of a definite program will only result in further delay of long overdue action. We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending segregation of the teaching staff to be necessary for the final approval of a constitutionally adequate desegregation plan." *Clark v. Board of Education of the Little Rock School District*, No. 18,368, December 15, 1966 (unreported). In that case the Court did not impose "a set time with fixed mathematical requirements". However the Court was firm in its position: "First, as the Board has already positively pledged, future employment, assignment, transfer, and discharge of teachers must be free from racial consideration. Two, should the desegregation process cause the closing of schools employing individuals predominately of one race, the

displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system. *Smith v. Board of Education of Morrilton, supra.* Third, whenever possible, requests of individual staff members to transfer into minority situations should be honored by the Board. Finally, we believe the Board should make all additional positive commitments necessary to bring about some measure of racial balance in the staffs of the individual schools in the very near future. The age old distinction of 'white schools' and 'Negro schools' must be erased. The continuation of such distinctions only perpetrates inequality of educational opportunity and places in jeopardy the effective future operation of the entire 'freedom of choice' type plan."

In *Singleton I* we agreed with the original HEW Guidelines in requiring that an "adequate start" toward faculty desegregation should be made in 1966-67. The requirement that all grades be desegregated in 1967-68 increases the need for substantial progress beyond an "adequate start". It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of *new* faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment. If these two requirements are prescribed, the district court should be able to add specifics to meet the particular situation the case presents. The goal should be an equitable distribution of the better teachers.[119]

[119] Rev. Theodore M. Hesburgh, President of Notre Dame and a member of the Civil Rights Commission, makes these suggestions: "A realistic and quite possible approach to this is, I think, through the immediate improvement of all teachers of each race,

We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant cases.

VII.

We attach a decree to be entered by the district courts in these cases consolidated on appeal. See Appendix A.

We have carefully examined each of the records in these cases. In each instance the record supports the decree. However, the provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools. School boards, private plaintiffs, and the United States may, of course, come into court to prove that exceptional circum-

beginning with those who most need assistanee in being better qualified as teachers. ¶ At this precise time of transition, why not institute along with the whole process of desegregation in the South a positive program of upgrading all teachers in the present systems? In fact, the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve. One might even think of rotating teachers within the schools of a given district. There is already the existing pattern of academic year and summer institutes for just this purpose of improving teachers. . . . ¶ If this positive action could be moved along quickly, with good will from all concerned, school administrators, parents, and students, then we could eliminate the present cat-and-mouse game which is going on between the Federal Office of Education and the local Southern school districts. In fact, I have a feeling that the South could solve its problem long before the North, which has an educational desegregation problem which may be less amenable to solution because of entrenched patterns of housing segregation." Rep., U. S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965-66, p. 64.

stances compel modification of the decree. For example, school systems in areas which let school out during planting and harvesting seasons may find that the period for exercise of choice of schools, March 1-31, should be changed to a different month.

As *Brown* dictates, the decree places responsibility on the school authorities to take affirmative action to bring about a unitary, non-racial system. As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?

The substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by decisions of the Supreme Court and of this Court, in many instances before the HEW Guidelines were published. For administrative details, we have looked to the Office of Education. For example, those familiar with the HEW Guidelines will note that the decree follows the Guidelines exactly as to the form letters which go to parents announcing the need to exercise a choice of schools, and the forms for exercising that choice are the same. Indeed a close parallel will be noted between much in Parts II through V of the decree and the Guideline provisions.

The great bulk of the school districts in this circuit have applied for federal financial assistance and

therefore operate under voluntary desegregation plans.[120] Approval of these plans by the Office of Education qualifies the schools for federal aid. In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964. Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations.

Some schools have made no move to desegregate or have had plans rejected as unsatisfactory by district courts or the HEW. We expect the provisions of the decree to be applied in proceedings involving such schools. Other schools have earlier court-approved plans which fall short of the terms of the decree. On motion by proper parties to re-open these cases, we expect these plans to be modified to conform with our decree. In some cases the parties may challenge various aspects of HEW-approved plans. Our approval of the existing Guidelines and the deference owed to any future Guidelines is not intended to deny a day in court to any person asserting individual rights or

[120] "Although only 164 (3.4 percent) of the 4,941 school districts in the South have qualified by the court order route, these districts include most of the major cities of the South and, accordingly, a large share of the population. Court orders are a significant method of qualification particularly in Louisiana, where official resistance to compliance with Title VI has been most widespread. In Louisiana, 32 court orders have been accepted, affecting 86.5 percent of the school districts judged qualified." 1966—U. S. Comm. on Civ. Rights, Survey of School Desegregation in the Southern and Border States 46. See also Table 3 in Appendix B.

to any school board contesting HEW action.[121] In any school desegregation case the issue concerns the constitutional rights of Negroes, individually and as a class, and the constitutional rights of the State—not the issue whether federal financial assistance should be withheld under Title VI of the Civil Rights Act of 1964.

When school systems are under court-ordered desegregation, the courts are responsible for determining the sufficiency of the system's compliance with the decree. The courts' task, therefore, is a continuing process, especially in major areas readily susceptible of observation and measurement, such as faculty integration and student desegregation. (1) As to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hall-mark of the dual system. To aid the courts in its task, the decree requires the school authorities to report to the district courts the progress made toward faculty integration. The school authorities bear the burden of justifying an apparent lack of progress.[122] (2) As to students, the

[121] For an HEW approved desegregation plan held insufficient to protect constitutional rights of Negro students see Brown v. Board of Education of DeWitt School District, E.D. Ark. 1966, F.Supp. See also Thompson v. County School Board of Hanover County, E.D.Va. 1966, 252 F. Supp. 546; Turner v. County School Board of Goochland County, E.D.Va. 1966, 252 F. Supp. 578.

[122] "Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts. . . ." Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192. In *Brown II*, permitting desegregation with *"deliberate* speed" the Supreme Court put the "burden . . . upon the defendants to establish that [additional] time is necessary to carry out the ruling in an effective manner". 349 U.S. at 302.

decree requires school authorities to make reports to the court showing by race, by school, by grade, the choices made in each "choice period". A similar report is required after schools open to show what actually happened when schools opened.

What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation "to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems."[123] District courts may call upon HEW for assistance in determining whether a school board's performance measures up to its obligation to desegregate. If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan,[124] or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities.

Given the knowledge of the educators and administrators in the Office of Education and their day to

[123] U. S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-66, p. 54.

[124] The Princeton plan involves establishing attendance zones including more than one school and assigning students by grade rather than by residence location. Thus all of the zone's students in grades 1 through 3 would attend school A, while all students in grades 4 through 6 would attend school B. For a discussion of the plan see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 573 (1965).

day experience with thousands of school systems, judges and school officials can ill afford to turn their backs on the proffer of advice from HEW. Or from any responsible government agency or independent group competent to work toward solution of the complex problem of de jure discrimination bequeathed this generation by ten preceding generations.

Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed".

* * * * *

In the suit against the Caddo Parish School Board July 19, 1965, the United States moved to intervene under §902 of the Civil Rights Act of 1964 (42 U.S.C. §2000h-2). The motion was filed twelve days after the Board submitted its plan in compliance with the district court's decree of June 14, 1965, but two days before the original plaintiffs filed their objections and before the court issued its order approving the plan. The district court denied the motion on the ground that it came too late. In these circumstances we consider that the motion was timely filed and should have been granted.

This Court denied the motion of certain appellants to consolidate their cases, but allowed consolidation of briefs and, in effect, treated the cases as consolidated for purposes of appeal. The Court, however, in each case has separately considered the particular contentions of all the parties in the light of the record.

The Court REVERSES the judgments below and REMANDS each case to the district court for further proceedings in accordance with this opinion.

COX, District Judge: I reserve the right to dissent in whole or in part at a later date.

APPENDIX A:

PROPOSED DECREE

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of past racial discrimination in the operation of the school system:

I.

SPEED OF DESEGREGATION

Commencing with the 1967-68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II.

EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person

serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who

exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. (See paragraph II(e).) Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(e) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement

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of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location of the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may

be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors

shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III.

PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV.

TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V.

SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as Commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI.

SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

VII.

NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation.

VIII.

FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of teachers in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year notwithstanding

that teacher contracts for the 1966-67 or 1967-68 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other pro-

fessional staff members to eliminate past discriminatory patterns.

IX.

REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described,

serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought

to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child .....
(Last) (First) (Middle)

Address .....

Name of Parent or other
adult serving as parent .....

If child is entering first grade, date of birth:
.....
(Month) (Day) (Year)

Grade child is entering .....

School attended last year .....

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Signature .....
Date .....

.....
.....

To be filled in by Superintendent:
School Assigned .....[1]

1. In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

APPENDIX B.

Rate of Change and Status of Desegregation

(Leeson, Faster Pace, Scarcer Records, Southern Education Report 28-32 (Jan.-Feb. 1966), quoted in Emmerson and Huber, Political and Civil Rights in the United States, 695-99 (1967))

". . . Both the 11-state Southern area and the border area, the latter consisting of six states and the District of Columbia, experienced a sharper increase in the percentage of Negroes in desegregated schools for 1965-66 than in previous years. But only the Southern states showed a changed attitude toward reporting records by race; in only three Southern states could nearly complete statistics be obtained district by district. As in other years, three of the border states plus the District of Columbia continued to keep records by race, and three states did not.

Correspondents for Southern Education Reporting Service . . . found that 15.89 per cent of the Negroes enrolled in the public schools of the region attended classes with whites, mostly in formerly all-white schools but sometimes also in formerly all-Negro schools. This numbered 567,789 Negro students out of the region's Negro enrollment of 3,572,810.

In the first 10 years after the Supreme Court decisions on segregated schools, in 1954 and 1955, the

Southern and border region increased the number of Negroes in schools with whites at an average of about one per cent a year. Although the impetus of the Supreme Court's rulings and the possibility of direct involvement in legal action were factors, most districts desegregating through last year acted "voluntarily" and only about 10 per cent required a specific court order. By the end of the 1964-65 school year, the region had enrolled 10.9 per cent of its Negro students in biracial classrooms.

The 1964 Civil Rights Act brought pressure on every district in the nation but the compliance effort admittedly was concentrated on the South. . . . Beginning in the spring of 1965 and continuing even through the first months of the 1965-66 school year, HEW's Office of Education negotiated with officials in each district to obtain compliance by the school officials either signing a statement, submitting a court-ordered desegregation plan or adopting a voluntary plan.

With the new school year, the region had increased the number of Negroes in desegregated schools by five percentage points to reach 15.9 per cent, while in the previous two school years the rate of increase in this figure had only been between one and two percentage points. For 1964-65, the region had 10.9 per cent of the Negro enrollment in desegregated schools, an increase of 1.7 percentage points over 1963-64, and for that year the 9.2 per cent figure was an increase of 1.2 percentage points over 1962-63. (*See Table* I.) . . .

TABLE I

The Rate of Change

Percentage of Negroes in Schools with Whites

School Year	South	% Change	Border	% Change	Region	% Change
1959-60*	.160		45.4		6.4	
1960-61	.162	.002	49.0	3.6	7.0	.6
1961-62	.241	.079	52.5	3.5	7.6	.6
1962-63	.453	.212	51.8	0.7	8.0	.4
1963-64	1.17	.717	54.8	3.0	9.2	1.2
1964-65	2.25	1.08	58.3	3.5	10.9	1.7
1965-66	6.01	3.76	68.9	10.6	15.9	5.0

* First school year in which SERS began recording number of Negroes in schools with whites.

Up through the 1962-63 school year, the 11 Southern states together had fewer than one per cent of their Negro students in schools with whites. In 1963-64, the figure passed the one per cent mark and it almost doubled for 1964-65 to become 2.25 per cent of the Negroes in biracial schools, an increase of more than one percentage point. For the 1965-66 school year, the percentage more than doubled and reached 6.01 per cent.[1]

[1] Other estimates are summarized in Report of the United States Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965-1966, 27-28 (Feb. 1966)

". . . The Office of Education based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimates that 216,000, or 7.5 percent, of the Negro students in the 11 Deep South States are enrolled in schoo this year with white pupils. [Office of Education, telephone survey, Table I, Sept. 27, 1965.] Civil rights organizations, relying upon figures obtained from a variety of sources, including field workers, advance a lower figure. The Southern Regional Council's estimate is 151,416 Negro pupils, or 5.23 percent of the total. [Southern Regional Council, 'School

The six border states and the District of Columbia desegregated at a faster rate than did the South, and by the 1961-62 school year that area had more than half of its Negro enrollment attending desegregated schools. The annual change in the number of Negroes in desegregated border schools averaged about three per cent a year, and by 1964-65, the border area had desegregated 58.3 per cent of its Negro enrollment. In the current school year, the border area has 68.9 per cent of its Negro students attending the same schools with whites, a jump of over 10 percentage points from the previous year's figure.

This year, as in previous years, a disparity exists between what might be called "technical" desegregation and "actual" desegregation. Last year, for example, 56 per cent of the region's Negro students were enrolled in districts having desegregation policies, but about 11 per cent of the total Negro enrollment attended desegregated schools. This year, the region has 97 per cent of its districts in official compliance with federal desegregation regulations, and 93 per cent of the region's combined Negro and white enrollment comes from these districts. However, the actual attendance of Negroes in desegregated schools amounts to almost 16 per cent. The difference in these figures was accentuated this year by the fact that almost 2,000 school districts having either all-

Desegregation: Old Problems Under a New Law' 9, Sept. 1965.] The American Friends Service Committee and NAACP Legal Defense and Educational Fund agree that the actual figure is less than 6 percent [American Friends Service Committee and NAACP Legal Defense and Educational Fund, 'Report on the Implementation of Title VI of the Civil Rights Act of 1964 in Regard to School Desegregation' 4, Nov. 15, 1965]."

white or all-Negro enrollments are included in the "in compliance" statistics. . . .

Among the Southern states, Texas leads in the number and percentage of Negroes in schools with whites —an estimated 60,000 Negroes or 17 per cent of the state's Negro enrollment. Tennessee ranks second in the area with 16 per cent and Virginia third with 11 per cent. Three states—Alabama, Louisiana, and Mississippi—continue to have less than one per cent of their Negro enrollment attending schools with whites. The other Southern states—Arkansas, Florida, Georgia, North Carolina and South Carolina—vary between 1 and 10 per cent of their Negro students in biracial classrooms.

All but one of the border states have more than half of their Negro enrollments in desegregated schools. Oklahoma has 38 per cent of its Negroes in biracial schools, Maryland has 56 per cent, and Delaware, the District of Columbia, Kentucky, . . . Missouri and West Virginia have desegregated more than three-fourths of their Negro student population. . . .

The desegregation statistic showing the sharpest increase this year was the number of districts with desegregation policies. The region now has 4,804 public school districts that have received approval from the U. S. Office of Education for their desegregation proposals. When the last school year ended, SERS reported that 1,476 districts had desegregated in practice or in policy.

TABLE III

Status of Desegregation

(17 Southern and Border States and D.C.)

	School Districts				Enrollment		Negroes in Schools with Whites	
	Total	With Negroes and Whites	In Compliance†	Not in Compliance†	White	Negro	No.	%††
Alabama	118	119	105	14	559,123**	295,648**	1,250*	.43
Arkansas	410	217	400	10	337,652**	111,952**	4,900*	4.38
Florida	67	67	67	0	1,056,805*	256,063*	25,000*	9.76
Georgia	196	180	192	5	784,917*	355,950*	9,465*	2.66
Louisiana	67	67	33	34	483,941	318,651	2,187	.69
Mississippi	149	149	118	31	309,413	296,834	1,750*	.59
North Carolina	170	170	165	4	828,638**	349,282**	18,000*	5.15
South Carolina	108	108	86	21	374,007	283,983	3,864	1.46
Tennessee	152	129	149	2	714,241*	176,541*	28,801	16.31
Texas	1,325	850	1,303	7	2,136,150*	349,192*	60,000*	17.18
Virginia	130	127	124	12	757,037**	239,729**	27,550*	11.49
SOUTH	2,892	2,183	2,742	140	8,341,924	3,014,025	182,767	6.01
Delaware	86	47	59	0	86,041	20,485	17,069	83.32
Dist. of Columbia	1	1	1	0	15,173	128,843	109,270	84.81
Kentucky	200	167	204	0	713,451**	59,835**	46,891	78.37
Maryland	24	23	24	0	583,796	178,881	99,443	55.60
Missouri	1,096	212*	675	0	843,167	105,171	79,000*	75.12
Oklahoma	1,048	322	1,044	4	564,250*	45,750*	17,500*	38.25
West Virginia	55	44	55	0	425,087*	19,850*	15,850*	79.85
BORDER	2,480	817	2,062	4	3,230,965	558,785	385,022	68.90
REGION	5,372	3,000	4,804	144	11,572,889	3,572,810	567,789	15.89

* Estimated.
** 1964-65.
† The sum of adding the districts "In Compliance" and "Not in Compliance" will not always equal the total number of districts because the Office of Education reports a different number of districts from that of some of the state departments of education.
†† The number of Negroes in schools with whites, compared to the total Negro enrollment.

COX, District Judge, dissenting:

The majority opinion herein impels my dissent, with deference, to its general theme, that precedent required the public schools to mix the races rather than desegregate such schools by removing all effects of state action which may have heretofore compelled segregation, so as to permit these schools to be operated upon a proper free choice plan. This Court has heretofore firmly and soundly (as decision and not gratuitously) committed itself to the views expressed by the distinguished jurists in *Briggs v. Elliott*, 132 F. Supp. 776. The majority now seeks to criticize the *Briggs* case and disparage it as dictum, although this Court in several reported decisions has embraced and adopted *Briggs* with extensive quotations from it as the decisional law of this Circuit. Surely, only two of the judges of this Court may not now single-handedly reverse those decisions and change such law of this Circuit.

These school cases all stem from the decision of the Supreme Court of the United States in the familiar *Brown* cases.[1] Nothing was said in those cases or has since been said by the Supreme Court to justify or support the extremely harsh plan of enforced integration devised by the majority decision. Signifi-

[1] Brown I *Brown v. Board of Education of Topeka*, 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873.
Brown II *Brown v. Board of Education of Topeka, Kansas*, 349 US 294, 75 S.Ct. 753, 99 L.Ed. 1083.
On December 6, 1965 in *Patricia Rogers, et al v. Edgar F. Paul, et al*, 382 US 198, 86 S.Ct. 358, the Court decried delays in desegregation of public schools and called for an acceleration of the process, but neither said nor intimidated the existence of any power or the justification for any authority to forcefully mix or integrate these schools.

cantly, there is nothing in the Civil Rights Act of 1964 to suggest the propriety of this Court adopting and following any guidelines of the Health, Education and Welfare Commissioner in these school desegregation cases in such respect. The policy statement of Congress as contained in the act itself expressly disclaims any intention or purpose to do that which these guidelines, and the majority opinion approving them, do in complete disregard thereof.

No informed person at this late date would now argue with the soundness of the philosophy of the *Brown* decision. That case simply declared the constitutional right of negro children to attend public schools of their own free choice without any kind of restraint by state action. That Court has made it clear that the time for "deliberate" speed in desegregating these public schools has now expired, but the majority opinion herein is the first to say that the *Brown* case, together with the Civil Rights Act of 1964, makes it necessary that these public schools must now integrate and mix these schools and their facilities, "lock, stock and barrel." That view comes as a strange construction of the Fourteenth Amendment rights of colored children. The passage of time since the rendition of the *Brown* case; and of natural disparities which are found in so many school plans before the Court; and the difficult problems posed before the Court by such plans certainly can provide no legal justification or basis for this extreme view and harsh and mailed fist decision at this time. These questions involving principles of common sense and law are

readily resolved by a court of equity without being properly accused of giving an advisory opinion. The decision in such case is not overtaxing on a court of equity and its articulated conclusions can be implemented by an enforceable decree even at the expenditure of some well spent time, patience and energy of the Court. If a Court is to write a decree, it should be the decree of that Court and not the by-product of some administrative agency without knowledge or sworn obligation to resolve sacred constitutional rights and principles. Unilaterally prepared guidelines allegedly devised by the Commissioner may or not accord with his own views, but such an anomalously prepared document could not justify this Court in adopting it "lock, stock and barrel" under any pretext and even with repeated disavowals of such intention or purpose.

The Constitution of the United States is not the dead hand of the past strangling the liberties of a free people; it is a living document designed for all time to perpetuate liberty, freedom and justice for every person, young or old, who is born under or who comes within its protecting shield. As was said many years ago, "in moving water there is life, in still waters there is stagnation and death." The Constitution was framed not for one era, but for all time. But when the Courts transform viability into elasticity, constitutional rights are illusory. The rope of liberty may be twisted and become a garrote which strangles those who seek its protection. If the majority opinion in these cases is permitted to stand, it will, in the name

of protecting civil rights of some, destroy civil rights and constitutional liberties of all our citizens, their children and their children's children.

The Supreme Court, in *Brown II*, said that "school authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." It thereupon became the duty of the Court, acting as a Court of Equity, under such principles to see that public schools, still operating under the dual system by state action, were *desegregated* (not integrated) in accordance with the vested constitutional right of colored children. Judicial haste and impatience cannot justify this Court in equating integration with desegregation. No Court up to this time has been heard to say that this Court now has the power and the authority to force integration of both races upon these public schools without regard to any equitable considerations, or the will or wish of either race. The decisions of this Court deserve and must have stability and integrity. It was the 1965 guidelines of HEW that were approved by this Court in *Derek Jerome Singleton v. Jackson Municipal Separate School District*, 255 F.2d 865. Judge Wisdom wrote for the Court and Judge Thornberry concurred in that case on January 26, 1966; and there was not a word in that case to the effect that this Court then thought that any decision or statute or guidelines under any statute required or justified *forced integration*. Almost before that slip

opinion reached the bound volume, this Court has now written on December 29, 1966, a vastly different opinion with no change intervening in the law.

The last reported school case from this Circuit, decided August 16, 1966 by Judge Tuttle and Judge Thornberry in *Birdie Mae Davis, et al v. Board of School Commissioners of Mobile County, et al,* 364 F.2d 896, this Court still wrote of accelerating a plan of *desegregation.* As if to foreshadow the point of Judge Wisdom's "nettle" in the majority opinion in this case, Judge Tuttle wrote in his Note 1 an explanation of his changing requirements in these school cases for the delayed enjoyment of constitutional rights by accelerating *desegregation.* Davis said that negro children, as individuals, had the right to transfer to schools from which they were excluded because of their race, and said that this had been the law since the *Brown* decision; but that misunderstanding of that principle was perhaps due to the popularity "of an oversimplified dictum that the Constitution does not require integration, Briggs v. Elliott, 132 F. Supp. 776, 777." That is the first and only expressed criticism of Briggs found among the decisions of this Circuit, but the Court did not comment upon the viability and soundness of the many decisions of this Circuit which wholeheartedly embraced and repeatedly reaffirmed the so-called dicta in *Briggs. Davis* dealt with an urban area in Mobile, Alabama, while these cases deal with small communities or rural schools but that could have no possible bearing on desegregation versus or as distinguished from immediate forced integration or mixing of these schools.

In *Alfred Avery, Jr., a Minor by his Mother and Next Friend, Mrs. Alfred Avery, et al v. Wichita Independent School District, et al*, 241 F.2d 230 (1957), this Court said:

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Id., 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, D.C.E.D.S.C., 132 F. Supp. 776, 777:

"'* * * it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different

churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Again, this Court in *Hilda Ruth Borders, a Minor, et al v. Dr. Edwin L. Rippy, et al,* 247 F.2d 268 (1957) said: "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

In a public housing case, participated in by Judge Wisdom, *Queen Cohen v. Public Housing Administration,* 257 F.2d 73, it is said: "Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races, but only negatively to forbid governmentally enforced segregation."

This Court in *Sandra Craig Bcson, et al v. Dr. Edwin L. Rippy, et al,* 285 F.2d 43, said: "Indeed, *this Court has adopted the reasoning* in Briggs v. Elliott, DC.E.D.S.C. 1955, 132 F. Supp. 776, relied on by the Sixth Circuit, and has further said: 'The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.' Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268, 271.

"Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." It is that decision in *Briggs v. Elliott, supra,* which the majority here now seek to criticize and repudiate.

In *Ralph Stell, et al v. Savannah-Chatham County Board of Education, et al,* (5CA) 333 F.2d 55, 59, in footnote 2 it is said: "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrim-

ination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638."

This Court in *Darrell Kenyatta Evers, et al v. Jackson Municipal Separate School District*, 328 F.2d 408 (1964) said: "This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. See Avery v. Wichita Falls Ind. School Dist., 5 Cir., 1957, 241 F.2d 230; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 5 Cir., 1958, 257 F.2d 73, cert. den., 358 U.S. 928, 79 S.Ct. 315, 3 L.Ed. 2d 302; Holland v. Board of Public Instruction, supra; and Shuttlesworth v. Birmingham Board of Education, supra. The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873." The same teaching is expressed in a park case from this Court, styled *City of Montgomery, Alabama v. Georgia Theresa Gilmore*, 277 F.2d 364. In the many cases from this Court involving the race issue in public schools (there being some forty-one of them according to the majority opinion), not one of them speaks of any requirement or duty of the school to forcefully integrate the races, or to compel the races to mix with each other in public schools; but every

one of them speak of *desegregating* such schools. The word desegregate does not appear in Webster's New International Dictionary, Second Edition, Edited in 1950. But Webster's New Collegiate Dictionary (a Merriam-Webster) defines *desegregation* as: "To free itself of any law, provision or practice requiring isolation of the members of a particular race in separate units, especially in military service or in education."

In sum, there is no law to require one of these public schools to integrate or force mix these races in public schools. But these public schools, which have been heretofore segregated by state action, and operate under a dual system, should be required to remove every vestige of state influence toward segregation of the races in these schools; and these colored children should be fully advised of their constitutional right to attend public schools of their choice, completely without regard to race. Many problems exist and are created by the proper enforcement of desegregation plans that will assure a full sweep of real freedom of choice to these negro children, and this Court cannot by only two of its members become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case.

Such a course would do violence to the ancient rule of Stare Decisis. In *Donnelly Garment Co. v. National Labor Relations Board*, (8CCA) 123 F.2d 215: "It is a long-established rule that judges of the same court

will not knowingly review, reverse or overrule each other's decisions. Shreve v. Cheesman, 8 Cir., 69 F. 785, 790, 791; Plattner Implement Co. v. International Harvester Co., 8 Cir., 133 F. 376, 378, 379. The necessity of such a rule in the interest of an orderly administration of justice is clear." In *Sanford Napoleon Powell v. United States*, (7CA) 338 F.2d 556 (1964), it is said: "Our decision in Lauer has been criticized. However, this decision is the law of this Circuit unless and until this Court (presumably sitting en banc) would determine otherwise or unless higher authority might so determine."

Rule 25(a) of the Fifth Circuit provides for a rehearing in any case upon vote of a majority of the circuit judges in active service for any reason which appears to them to be sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except "when necessary to secure or maintain uniformity or continuity in the decisions of the court, etc." The majority opinion simply does not reflect the well considered and firmly stated composite decision of this Circuit; and in that view, is not an accurate or proper statement of the law in this case as it now exists in the Fifth Circuit.

The Civil Rights Act of 1964 (42 U.S.C., 1958 ed., §2000c-6) refers to "desegregation in public education" and not to forced mixing or integration of the races. That same section states "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve

a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The English language simply could not be summoned to state any more clearly than does that very positive enactment of Congress, that these so-called "guidelines" of this administrative agency are not sacrosanct expositions of school law (if so intended), but are actually promulgated and being used in opposition to and in violation of this positive statute. Contrary to the majority opinion, it was never the intention or purpose of the Congress to constitute the Commissioner of Health, Education and Welfare as the sidewalk superintendent of this Court in these school cases. On the contrary, 42 U.S.C., 1958 ed., §2000c-2 provides that the Commissioner, *only upon application* of a *school board, state, municipality, school district* or *other governmental unit,* can render any technical assistance to such an applicant. Nowhere in that act is it contemplated that this court should abdicate its power and authority to act upon and decide a case on appeal to it as a court of equity, and simply decide it by rubber stamping one of the annual guideline bulletins of an administrative bureau of the United States in Washington. The attitude and position of this Court in doing exactly that in this case is not improved by disavowing any intention or purpose to do so.

There were seven consolidated cases before the Court which are embraced in this decision. Most, if not all, of the plans in those cases were defective and needed updating for a more realistic and effective application of the free choice principle under the former decisions of this Court; but they did not need or deserve the harsh and unprecedented treatment accorded these schools by the majority decision in these cases. The colored children are not befriended and their lot is not improved by this unprecedented majority opinion and the entire school system will suffer under the impact of this improvident administrative directive as thus adopted by this Court.

My duty impels me to file this DISSENT to the majority view in these cases with great deference to both of my distinguished associates.

Adm. Office. U. S. Courts—E. S. Upton Printing Co., N. O., La.

SUPREME COURT, U.S.
No. 282
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 29, 1966, affirmed on re-hearing on March 29, 1967.

STATEMENT AS TO CONSOLIDATED RECORD AND APPENDIX

In the Court below this case was docketed and argued at the same time as No. 23345, *United States of America and Linda Stout v. Jefferson County Board of*

Education, et al., No. 23331, *United States of America v. The Board of Education of the City of Fairfield, et al.*, No. 23335, *United States of America v. The Board of Education of the City of Bessemer, et al.*, all on appeal from the United States District Court for the Northern District of Alabama and No. 23274, *United States of America v. Caddo Parish School Board, et al.*, No. 23365, *United States of America v. The Bossier Parish School Board, et al.*, No. 23173, *Margaret M. Johnson, et al. v. Jackson Parish School Board, et al.*, No. 23192, *Yvornia Decarol Banks, et al. v. Claiborne Parish School Board, et al.*, No. 23253, *Jimmy Andrews, et al. v. City of Monroe, Louisiana, et al.*, all on appeal from the United States District Court for the Western District of Louisiana.

Although the title of this case appears on the fly leaf of the opinion of the Court below on re-hearing, along with the cases cited above, no motion to consolidate this case with the others has been filed by any party and the Court below has never entered any formal order consolidating this case with the others.

The Attorney General for the State of Louisiana and other counsel representing the petitioning school boards in the cases arising from the United States District Court for the Western District of Louisiana, has prepared and filed a petition for Writ of Certiorari in those cases as are counsel for the Alabama school boards. In the interest of costs and time, under authority of Rules 23(5) and 15(3) and after telephone conference with the Clerk of this Court, counsel in all of the Louisiana cases, including the instant case, have

filed a consolidated record, filed with that petition. That petition also contains certain exhibits which are also applicable to this case. The record of this case will be found in Volume VII of the consolidated record filed with the joint petition filed on behalf of the other Louisiana school boards.

Petitioner believes the facts in its situation to be sufficiently different, and the application of the law therefore sufficiently different, to warrant its filing a separate petition for certiorari. Consequently, references herein to the record and exhibits will be to those contained in the consolidated record and exhibits filed with the petition of the other Louisiana school boards except where noted as attached to this petition. That consolidated petition is entitled *Caddo Parish School Board, et al., Petitioners, v. United States of America, Respondents, No.* 256. For example, references to the consolidated record will appear as C R VII p..... References to the exhibits in the consolidated petition, will appear as C P exhibit A, p..... References to appendices attached to this petition will appear as Appendix IV, p.....

CITATIONS TO OPINIONS BELOW

The orders of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division are found on p. 4 through 9 and 161 through 167 of Volume VII of the Consolidated Record. The original opinion of the United States Court of Appeals for the Fifth Circuit is found at p. 17 through 173 of Volume VIII of the Consolidated Record. The opin-

ion on re-hearing is found at Pages 244 through 327 of Volume VIII of the Consolidated Record.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 29, 1966 and is contained in the consolidated record, Volume VIII, p. 174-179. Application for re-hearing was made and the same granted on February 9, 1967, C.R. Volume VIII, p. 237-239. The Court later allowed oral argument on the said re-hearing, C.R. Volume VIII, p. 240-242. On March 29, 1967 the Court issued an opinion affirming and slightly modifying the original opinion, C.R., Volume VIII, p. 244-327 and issued its judgment in accordance therewith, C.R. Volume VIII, p. 328-333.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Does the prohibition of the Fourteenth Amendment against State action requiring segregation now suddenly require local school boards to affirmatively place certain students in certain schools on some percentage basis with race as the sole criteria for the selection of these students?

A. This Court has never said so and by implication has said it does not.

B. Most of the other Circuits have said it does not.

C. The Court below has heretofore said it does not.

II. Can any Court establish constitutional standards which apply to only some areas of our nation?

A. Can an Appellate Court assume the existence of certain facts (in this case the causes of residential segregation) without any evidence in the record as to such facts and where no evidentiary hearing has been held thereon at the District Court level?

III. Should the Appellate Courts hand down formalized, detailed decrees governing the operation of a local school system or should not this be left to the discretion of the trial court?

A. Does not good faith action and progress in this field by this school board justify a different order or decree from some school board which has refused to move forward?

B. Since public education is historically a local matter and since desegregation may drastically affect any school system, should not local school boards be left as free as possible, unfettered by detailed, stereotyped decrees, to experiment as much as possible in this very sensitive area?

C. The provisions of the decree ordered by the Court below are unconstitutional and/or unnecessarily burdensome and should be vacated.

D. This school board should not be bound by the decree ordered by the Court below without having been formally consolidated with the other cases before the Court.

IV. Does the prohibition of the Fourteenth Amendment, as heretofore enunciated by this Court, justify or

require the massive and virtually immediate social change sought by the opinion of the Court below when such massive and immediate social change may result in a far more inadequate *public* education system than now exists?

A. Is this not particularly true when neither the Courts nor professional educators will have any control over such deterioration and the persons whose educational opportunities are here sought to be improved will actually suffer the most?

V. Even if it is educationally desirable to require a deliberate mixing of the races, religions and nationalities in each school, is this not a matter for Congressional action and not judicial decree?

A. It is doubtful if Congress has constitutional authority to so legislate, but even if Congress has such power, it has deliberately refused to enact such legislation and has specifically prohibited same.

VI. May the Court below assume that the Fourteenth Amendment requires faculty desegregation when the only cases dealing with this subject which have reached this Court have been remanded for an evidentiary hearing thereon, which hearings have never been had?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS: EQUAL PROTECTION

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Inferentially, the Civil Rights Act of 1964 is closely interwoven, therefore, the pertinent provisions thereof will be found printed in Exhibit G of the Consolidated Petition.

STATEMENT OF THE CASE

Petitioner is one of sixty-six separate school boards in the State of Louisiana. It has the responsibility of providing and operating an educational system for all the children residing in the Parish (County) of East Baton Rouge, Louisiana. It is administered by an eleven man board elected by the people of East Baton Rouge Parish. This board appoints a superintendent and other professional educators who are charged with the responsibility of administering the system in accordance with policies adopted by the board.

At the time this suit was originally instituted, almost all southern states were in the process of legally challenging the decision in the first Brown case. These

challenges continued throughout the south until this Court made it abundantly clear that the Brown decision would not be overturned or reversed. During this time, the State of Louisiana, as did many other southern states, adopted various maneuvers in an attempt to circumvent the Brown decision. These maneuvers by state legislatures continued through the early 1960's. With respect to Louisiana, most of this maneuvering by the Louisiana Legislature was affirmatively stopped by the decision of this Court in the cases generally entitled *Bush v. Orleans Parish School Board*, 308 F.2d 491.

However, the legislation adopted during this period, being binding upon local school boards until declared unconstitutional, effectively prevented school boards throughout the State of Louisiana from taking any affirmative steps toward compliance with the Fourteenth Amendment as set forth in the Brown decision. For example, in 1960, the Louisiana Legislature, in order to insure that the East Baton Rouge Parish School Board would take no affirmative action toward desegregation, adopted legislation increasing the size of the school board from 7 to 11 members and provided for the additional four members to be appointed by the governor. The then Governor of Louisiana appointed four members to the board for the express purpose of constituting a majority which would prevent the other members of the board (the previous majority on the 7 man board) from taking any affirmative action toward compliance with the Brown decision.

On May 25, 1960 an order was entered by the District Court enjoining the School Board from maintaining a segregated school system and ordering it to make necessary arrangements for the admission of all children to schools under its jurisdiction without regard to race. Again, because of legislative mandate, this decision was appealed and was affirmed by this Court in 1961 in *East Baton Rouge Parish School Board v. Davis*, 289 F. 2d 380 (5th Circuit, 1961), cert. denied 368 U.S. 831. Immediately thereafter, on January 22, 1962, plaintiffs filed a motion for further relief. However, the East Baton Rouge Parish School Board was still in the position of having a negative majority because of the previous "packing" of the board by the then state administration.

At this point, a group of business men, attorneys, and civic leaders filed a brief amicus curiae with the Federal District Court pointing out that the 4 appointed members to the board were required to stand for election at the end of that year. Appendix III, 69. They requested the Court to delay hearing on the motion for further relief until the people, white and Negro alike, had a chance to vote on these 4 appointed members thereby giving some direction to the other also elected members of the board. The United States District Court, very wisely, deferred to the request of this group and postponed any further hearings until after the fall elections. Petitioner gained additional support when a group of local businessmen, in 1962 and again in 1963, published a statement of principles in the local newspaper. Appendix IV, p. 75, Appendix V, p.

77. Of course, the board also received the opposite type pressure and is still receiving such opposition today. See Appendix VIII p. 89 & 90.

At the 1962 fall elections, one of the four appointed members chose not to stand for re-election. The other three appointed members of the "packed" board were defeated and the new board members took office at the last meeting of the board in December of that year. At that point, the East Baton Rouge Parish School Board was composed of 11 members, each a responsible citizen of his community having been elected by a citizenry that had indicated by the previous defeat of the appointed members to the "packed" board that their community was ready for the board to begin taking steps looking toward the administration of the East Baton Rouge Parish School system in a manner which would comply with the Fourteenth Amendment and the Brown decision.

The newly elected board immediately advised its staff to commence a study to determine the most practical, economical and orderly system under which this particular school system could comply with the Brown decision. The United States District Court also immediately assigned the motion for further relief for hearing, again wisely utilizing his discretion in giving this board sufficient time to come to the Court with a plan of its own rather than having the Court establish its own plan. His obvious reason for preferring the board to devise its own plan was that the only agency with the knowledge and experience to devise the best and most proper plan for this particular

school system were the people charged with its administration, the local school board and its staff.

Thereafter, the board and its staff, after studying plans utilized by various other school districts throughout the south, composed a plan consisting of parts of the plans then being utilized by school districts in other states plus some ideas of its own. This was necessary because some portions of some of the plans being utilized in other school districts in other states would not fit our own local school system, would have created new and most difficult administrative problems, and could have resulted in less elimination of discrimination rather than more elimination of discrimination.

This was not an easy task for this school board and its staff, as I am sure it was not an easy task for any school board or staff, no matter where located. For example, the board had a great deal of difficulty in determining which year, or at what grade, to commence desegregation. There was a great deal of discussion on the very pertinent point of at what age level could the children in the schools, both Negro and white, make this transition with the least damage to the students themselves, particularly the Negro children. Some board members felt the transition could better be made at the 12th grade level, some at the 1st grade level, and some even at the 5th and 6th grade level. However, as is true of all legislative bodies, reasonable men, sincerely trying to solve a difficult problem in the best interest of the students under their care and guidance, made their own beliefs secondary to the primary objective of moving forward and the majority

of the board finally decided on commencing at the 12th grade in accordance with the Atlanta plan as approved in *Calhoun v. Latimer*, 321 F. 2d, 302, (5th Circuit, 1963.), a plan having rather rigid transfer procedures and containing certain criteria for refusal of transfer requests. C.R. VII p. 6, 7, & 8.

On July 18, 1963 the United States District Court, after conferences with counsel for both plaintiffs and defendants, approved the plan submitted by the board with certain modifications imposed by the Court. C.R. VII p. 4-9. The board immediately put the plan in operation for the school year scheduled to commence in only approximately 60 days and operated under this plan until April 19, 1965 when counsel for plaintiff filed two motions; a motion for further relief and a motion to add additional parties defendant. At this point the plan had proceeded downward to include the 12th, 11th and 10th grades.

Between 1963 and 1965, as will appear from the deposition and testimony of Mr. Robert J. Aertker, Superintendent of Schools for East Baton Rouge Parish, C.R. VII p. 116 and 198, meetings were held with both principals and teachers to outline their responsibilities in accepting the Negro children into their schools without trouble. Notices were sent out in accordance with the plan. In the first year of operation under the original 1963 order and plan, the 1963-64 school year, 38 negro students applied for admission to 4 previously white schools with 27 being admitted. The following year, 1964-65, 107 negro students applied

and 61 were admitted to 4 previously white schools. Appendix II p. 65.

On the motion for further relief, the District Court again properly requested the Board to present a plan more in line with the latest announcements of the circuit courts, particularly the 5th Circuit. The hearing on the motion for further relief was had on June 2, 1965 at which time the case of *Lockett v. Board of Education of Muscogee County*, 342 F. 2d 225 (5th Circuit, 1965) was the last pronouncement of the Fifth Circuit and the district court required the board's plan to meet the minimum requirements as set forth in that case. These minimum requirements provided for the elimination of discrimination by grade in an upward progression from the first grade as well as a downward progression from the twelfth, at least two grades a year, and required that all grades be desegregated by the school year of 1968-69. The only deviations from the Lockett minimums which the District Court allowed were to permit the elimination of discrimination in the Junior High School grades, 7th, 8th and 9th, at the end, the school year commencing September 1968, for the reason that those grades are the most crowded grades in all schools and the school board was then, and is now, under a massive program to eliminate these crowded conditions at the junior high level. The other deviation was with respect to permitting students coming into the East Baton Rouge Parish School system for the first time at a grade level not yet desegregated to be treated as though that grade level were desegregated for that child alone. The

court felt that this would give particular children from out of the system greater rights than would have the other children in our own system which he did not feel was proper.

The Board readily followed the District Court's instructions and presented a modification of its existing plan in accordance with the Lockett requirements and this plan was approved by the District Court on July 15, 1965. The new 1965 plan eliminated the rigid transfer procedures and eliminated all criteria previously used for denying transfers. The school system then commenced operating under a pure freedom of choice system. Although we have now operated two years under this system, such operation is not reflected in the record as it was from this order of the District Court that plaintiffs prosecuted the present appeal. The following year, the 1965-66 school year, 158 negro students applied for admission to 11 previously all white schools and all of them entered the school of their choice. The following year, the 1966-67 school year, 226 negro students applied for admission to 10 previously all white schools and all attended the school of their choice. Appendix II p. 66 and 67. The Board has just completed its spring pre-registration for the upcoming 1967-68 school year and due to the desegregation of five (5) additional grades (5th, 6th, 7th, 8th and 9th) next year, it appears that we will have 1611 negro students who have chosen, and will attend 37 previously all white schools next year. Of this total, 1298 are new registrants and 776 of those are from the (5) additional grades desegregated this year. We will

also have 12 white students entering two previously all Negro schools.

Furthermore, during the two year period from 1965 to date other good faith steps were taken by the Board toward compliance with Brown which were not required by the District Court order and which are not reflected in the record. All teacher and principal meetings were desegregated and all in-service training programs were desegregated. In addition, the Board commenced construction of an addition to the School Board office building in order to bring all negro supervisory and Staff personnel into the School Board office on a desegregated basis. This building is almost complete and is expected to be in operation on a desegregated basis by September of this year. Additional faculty desegregation will also occur this year.

REASONS FOR GRANTING THE WRIT

I.

A.

The decision of the Court below in the instant case, if not in direct conflict with the existing opinions of this Court, go so far beyond any previous decision of this Court that they require review by this Court to determine if they actually conflict with Constitutional principles previously stated by this Court.

The Court below says that "The only school desegregation plan that meets constitutional standards is *one that works.*" (emphasis added) *U.S. et al v. Jeff. County Bd. of Educ., et al*—Fed. 2nd—at page 7. CP

Exhibit L. Jefferson I, p. 7. Although the Court then fails to say explicitly what it means by "one that works", its references to the Civil Rights Act and HEW guidelines can lead to only one conclusion. Although it says the percentage requirements of the present HEW Guidelines are "general rules of thumb", *Jefferson* I, *supra, p. 95*, failure to meet these, and unknown future HEW requirements obviously implies a violation of the Constitution.

The 1966-67 HEW Guidelines refer to a percentage of desegregation of 15 to 20 percent for this School Board for the 1967-68 school year. CP Exhibit I p. 146 & 147. What will be the percentage figure for the 1968-69 school year? If we went to a pure geographic single zone system and still did not meet the percentage requirements of HEW, what then? Or, suppose that with a pure geographic single zone system we *did* meet the HEW requirements next year, but, because of people moving out of the zones, we fell below the percentages the next year, what then? The only answer to "one that works", must, obviously, according to the Court below, be the maintenance, by direct and forced assignment based solely on race, of a certain percentage of each race in each school. The entire Court, on rehearing, re-affirms this duty to balance the races in the schools when it says:

> "The Court holds that boards and officials administering public schools in this circuit[1] have the *affirmative duty* under the Fourteenth Amendment to bring about an *integrated*, unitary school system in which there are no Negro schools and

no white schools—just schools. *Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.* In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit *requires integration of faculties, facilities, and activities, as well as students.* To the extent that earlier decisions of this Court (more in the language of the opinion than in the effect of the holding) conflict with this view, the decisions are overruled." (Emphasis added) CP Exhibit L, Jefferson II, p. 5.

Yet, this Court has consistently held that the Fourteenth Amendment *only* prohibits the *states, state agencies and state officials, by legislation or administrative action,* from denying to any citizen, because of his race, any of the rights and privileges guaranteed by the Constitution and enjoyed by other citizens. In so doing this Court has held *state* discrimination because of race, (the denial of rights enjoyed by other citizens merely because of race), invalid in cases involving public playgrounds, *Watson v. City of Memphis,* 373 U.S. 526, 83 S.Ct. 1314 (1963); trespass convictions, where local segregation ordinances preempt private choice, *Peterson v. City of Greenville,* 373 U.S. 244, 83 S.Ct. 1119 (1963); seating in courtrooms, *Johnson v. Virginia,* 373 U.S. 61, 83 S.Ct. 1053 (1963); restaurants in public buildings, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 45 (1961); bus terminals, *Boyn-*

ton v. Com. of Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed. 2d 206 (1960); railroad dining-car facilities, *Henderson v. United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302 (1950); state enforcement of restrictive covenants based on race, *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); labor unions acting as statutory representatives of a craft, *Steele v. Louisville & Nashville R. Co.* 323 U.S. 192, 65 S.Ct. 226, voting, *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); and juries, *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879).

With regard to public schools, this Court, in interpreting the Fourteenth Amendment, has only said "Such an *opportunity*, (opportunity of an education) where the state has undertaken to provide it, is a right which must be made *available to all on equal terms*". (Emphasis added) *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. This language is the test of the Fourteenth Amendment—"available to all on equal terms". To say, as does the Court below, that to make all schools available to all students on the same basis is unconstitutional, is to ignore the history of, and judicial pronouncements of this Court on, the Fourteenth Amendment. It completely ignores the plain and explicit language of *Brown*, supra. In fact, Justice Clark in *Goss v. Board of Education of City of Knoxville, Tennessee*, 373 U.S. 686, 83 S.Ct., 1405, at p. 1408, in declaring invalid a "transfer out" provision, refers to trespass convictions which have been overturned "where local segregation ordinances

preempt private choice," (Emphasis added), *Peterson v. City of Greenville*, 373, U.S. 244, 83 S.Ct. 1119 (1963).

A further indication of the requirements of the Fourteenth Amendment are found in Justice Clark's comments at p. 1408 wherein he says:

> "Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available *to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case.* Pupils could then, at their option, (or that of their parents) *choose*, entirely free of any imposed racial considerations to remain in the school of their zone or to transfer to another. . . ." (Emphasis added)

There is other language to the same effect.

Cooper v. Arron, 358 U.S. 1, 78 S.Ct. 1401, is a further strong indication of the meaning of the Fourteenth Amendment as it applies to public education. Cooper was deemed so important by the Court at that time that *the opinion was issued under the names of each and every Justice of the entire court.* Justice Frankfurter felt it to be so important that he issued an additional concurring opinion. This Court thoroughly reviewed the history of school desegregation and its pronouncements thereon and then, quoting Brown, said at page 1403:

> "On May 17, 1954 this Court decided that

enforced racial segregation in the public schools of a state is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686." (Emphasis added)

Again on Page 1404, the entire Court quoted with approval the language of Brown saying:

". . . To that end, the Courts may consider problems related to administration arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units to *achieve a system of determining admission to the public schools on a non-racial basis*, and revision of local laws and regulations which may be necessary in solving the foregoing problems . . ." (Emphasis added)

Petitioner respectfully submits, that this school board has "achieved a system", through a freedom of choice plan, of "determining admission to the public schools on a non-racial basis". Again, on p. 1409 the entire Court says:

"The controlling legal principals are plain. The command by the Fourteenth Amendment is that *no 'state' shall deny* to any person within its jurisdiction the *equal protection* of the laws . . . the Constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the *equal protection* of the laws . . ." (Emphasis added)

To get the true meaning of *Brown* and other

interpretations of the Fourteenth Amendment by this Court, we also may look to further language of Justice Frankfurter in his concurring opinion in *Cooper*. On p. 1413 he says:

> "The process of ending *unconstitutional exclusion of pupils* from the common school system —*'common' meaning shared alike*—solely because of color is no doubt not an easy, overnight task in a few states where a drastic alteration in the ways of communities is involved." (Emphasis added)

Furthermore, in two cases in which the holding of the Circuit Court was directly contrary to the decision of the Court below, this Court has refused to reverse such holding. In *Bell v. School City of Gary*, (7 Cir.) 1963, 324 F.2nd 209, Cert. den. 377 U.S. 924, 84 S.Ct. 1223, the 7th Circuit said:

> "We agree with the argument of the defendants stated as 'There is no affirmative U.S. constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either negro or white pupils' ".

The Bell Court further quoted with approval *Briggs v. Elliott*, 132 F. Supp. 776 and the statement therein at p. 777:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

If these were not correct statements of the law, this Court could have said so at that time. Instead, you

denied certiorari. 377 U.S. 924 Again, in the case of *Bradley v. School Board of City of Richmond*, 345 F.2d 310 (1965), reversed on other grounds 382 U.S. 103, this court had a further opportunity to consider this question. The Bradley case upheld a freedom of choice plan. The Bradley Court said

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination . . ."

The Bradley Court further said:

> "As we clearly stated in *Jeffers v. Whitley*, 309 F.2d 621, 629, (Fourth Circuit, 1962), the Appellants are *not* entitled to an order *requiring the defendants to affect a general intermixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil because of the pupils' race . . ."

In the Bradley case, this Court granted certiorari and after consideration reversed on other grounds, 382 U.S. 103. If Bradley's statements of the law, as quoted above, were incorrect, this Court could have said so at that time.

The opinion of the Court below, in requiring an *affirmative* duty to "integrate" or "correct racial imbalance" or "balance the races", goes so far beyond the Constitutional *prohibition* and the prior language of this Court in all its decisions, as to be in actual, if not direct, conflict with the decisions of this Court.

B.

In addition to going far beyond all existing decisions of this Court, the decision of the Court below is in conflict with decisions of the Courts of Appeals of the First Circuit (*Springfield School Committee v. Barksdale*, 348 F.2d 261 (1965); the Third Circuit (*Evans v. Ennis* 281 F.2d 385, 1960); the Fourth Circuit (*Swann v. Charlotte—Mecklenburg Board of Education* 369 F.2d 29, 1966, *Jeffers v. Whitley, infra*, and *Bradley v. School Bd. of Richmond, infra*) the Sixth Circuit (*Deal v. Cincinnati Board of Education* 369 F.2d 55, 1966) the Seventh Circuit (*Bell v. School City of Gary, Indiana* 324 F.2d 209 (1963) cert. denied 377 U.S. 924, 1965) the Eighth Circuit (*Clark v. Board of Education of Little Rock* 369 F.2d 661, 1966, Re-hearing denied—1967).

All of these cases consistently follow the doctrine set forth in *Briggs v. Elliott*, 132 F.Supp. 776, wherein the Court said:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

For example, in Deal, supra, the Court said:

> "Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or *result from private, not school, prejudice. We read Brown as prohibiting only enforced segregation. . . .*
>
> We hold that there is *no constitutional duty*

on the part of the Board to bus Negro or white children out of their neighborhood or to transfer classes for the *sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select school sites solely in furtherance of such a purpose." Emphasis added)

Or, as was said in *Swann, supra:*

"... Whatever the Board may do in response to its own initiative or that of the community, *we have held that there is no Constitutional requirement* that it act with the conscious purpose of achieving the maximum mixture of races in the school population. ..."

The recent decision of the Eighth Circuit in *Clark, supra,* in which a re-hearing was denied in April of this year, still reaches this conclusion when the Court said:

"Though the Board has a positive duty to initiate a plan of desegregation, *the constitutionality of that plan does not necessarily depend upon favorable statistics indicating integration of the races.* The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the School Board, it cannot be said that the State is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their classrooms. We find no unlawful discrimination in the giving of students the free choice of schools. ..." (Emphasis added)

C.

Furthermore, the Court below, in one fell swoop, specifically overruled ten of its own decisions, none over ten years old and three rendered less than four years ago. *Avery v. Wichita Falls Independent School District*, 1956, 241 F.2d 230; *Borders v. Rippy*, 1957, 247 F.2d 268; *Rippy v. Borders*, 1957, 257 F.2d 73; *Cohen v. Public Housing Administration*, 1958, 257 F.2d 73; *City of Montgomery v. Gilmore*, 1960, 277 F.2d 364; *Boson v. Rippy*, 1960, 285 F.2d 43; *Stell v. Savannah-Chatham County Board of Education*, 1964, 333 F.2d 55; *Evers v. Jackson*, 1964, 328 F.2d 408; *Lockett v. Board of Education of Muscogee County*, 1965, 342 F.2d 225. *Jefferson II*, page 6, footnote 3, CP Exhibit L p. 6. **Does the meaning of our Constitution really change that drastically, that fast?** Or, is the Court below attempting to make the Constitution what Justice Frankfurter, in his concurring opinion in *Cooper*, says it is not when he said at page 1413:

> "The Constitution is not the formulation of the merely personal views of this Court . . ."

And is not the court below justly subject to the criticism expressed by Judge Cox in his dissenting opinion to *Jefferson I*, C.P. Exhibit L, Jefferson I, p. 150, when he said:

> ". . . This Court cannot . . . become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case . . ."

Or the criticism expressed by Judge Hutchinson in

Denzel Milton Lee v. United States of America, 322 F.2d 770 (C.A. 5-1963) when he said:

> ". . . I emphatically condemn and reject the majority view as simply personal decreeing and, as such, alien to this Circuit and to the law generally and as completely unauthorized. . . ."

We respectfully submit that it is not the duty or the right of any Court to impose its own ideas of what is educationally or socially best on our many local communities. This is, at best, a function of Congress.

II.

A.

The Court below, apparently out of a belief that the South should be punished by being treated differently than any other area of the nation, and in an attempt to avoid the very clear holding of the 7th Circuit in *Bell v. School City of Gary*, 324 Fd. 2d 209, Cert. denied 377 U.S. 924 (1965), that segregation in schools resulting from residential housing patterns was not state enforced segregation and did not violate the Fourteenth Amendment, has twisted the very plain and explicit definition of "desegregation" contained in Section 401 (b) of Title 4 of the Civil Rights Act of 1964, an act of national application, so as to make it applicable only in the South.

Discrimination of such a punitive nature would be bad enough if imposed by Congressional action as was done immediately after the Civil War. Here, however, the court below makes it even worse by imposing it as minimum constitutional standards.

The Fourteenth Amendment itself provides that

all citizens, whether north, south, east or west, shall be treated alike. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. . ." Amendment Fourteen, Section I of the Constitution of the United States. Our Constitution should apply equally to all citizens in every section of our nation.

On the other hand, if the Court below is saying that the Constitution applies equally to everyone, everwhere, but that it has a different effect on different facts, the Court has assumed the existence of certain facts without any evidence whatsoever in the records of these cases to justify such assumption. Furthermore, to our knowledge there has never been an evidentiary hearing held on the question of what caused the racial makeup of residential housing patterns in any community of any state in our nation. The Court below has apparently assumed that where negroes and whites live in the same neighborhood in the North they have done so because they wanted to and conversely where they live in separate segregated neighborhoods in the North, they have also done so because they wanted to. Yet, for the South, the Court apparently assumes that where negroes and whites live in separate neighborhoods, it is not because they wanted to but because they were required to by law. What of the neighborhoods in the South where whites and negroes live together (and there are many) is that also the result of segregation laws? Again, not only was there not one iota of evidence in the record to justify such

conclusion, such proposition was not even mentioned, much less argued, by either plaintiffs or the government in brief or oral argument in any of these cases prior to the decision in Jefferson I.

Furthermore, the Court attempts to read into the very explicit definition of "desegregation" in the Civil Rights Act the distinction the Court wants to find by quoting comments of four Congressmen in hearings before Congress. This assumes (1) that these four Congressmen understood their comments as the Court insists on understanding them, (2) that the rest of the members of Congress also understood the comments of these four Congressmen as the Courts insists on understanding them, (3) that these four Congressmen had thoroughly read and thoroughly understood the Bell case and understood Bell to draw a distinction between "de jure segregation" and "de facto segregation" and (4) that the rest of the members of Congress had also thoroughly read and thoroughly understood the holding in Bell and understood the comments of these four Congressmen as the Court insists on doing.

However, even the statements of Senator Humphrey, quoted by the Court below, do not support the Court's position. On Page 81 of Jefferson the Court below quotes Senator Humphrey as follows:

> "*The bill does not attempt to integrate the schools*, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students will have to travel are considered legitimate means to

determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. *The fact that there is a racial imbalance per se is not something which is unconstitutional.* That is why we have attempted to clarify it with the language of Section IV." (Emphasis added)

We respectfully submit that the Court assumes too much from the isolated comments of these four Congressmen.

III.

A.

The formal decree handed down by the Court is so detailed, formalized and specific that it completely usurps the discretionary powers of the trial court. This is directly contrary to the statements of this Court in the second Brown decision which recognized that the District Court, being closer to and more knowledgeable of local situations was the proper Court to fashion orders and decrees in these matters. As soon as the application for stay order to this Court was refused, all of the District Courts in Louisiana felt legally bound to implement, word for word, the decree handed down by the Court below. Only the District Court for the Eastern District of Louisiana, Baton Rouge Division, felt that it had sufficient latitude so as to not hand down the detailed, specific, word for word, decree to all of the School Boards in his jurisdiction. However, since the East Baton Rouge Parish School Board had apparently, by some ad hoc method, been consolidated with the other cases in-

volved in Jefferson, he did feel obligated to hand us the Fifth Circuit decree although he indicated in the opinion issued therewith that he objected strongly to this case being taken out of his supervisory jurisdiction. Appendix I, p. 62.

Furthermore, the Court below, while in the very act of handing down a very specific, detailed decree, which has many burdensome and unnecessary provisions, at the same time appears to recognize its lack of competency to do that very thing when it says "School desegregation plans are often woefully inadequate; they rarely provide necessary detailed instructions and specific answers to the administrative problems. *And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers.*" CP Exhibit L Jefferson I, p. 24. This lack of competence is evident from the decree itself which imposes financial burdens in requiring a multiplicity of reports and a multiplicity of forms all of which are unnecessary, the upgrading of and/or closing of certain schools, limitations on the construction of schools, apparent or possible limitation on transfer of athletes to curtail proselyting of athletes, etc. This lack of knowledge is a problem for a District Court judge who hears the testimony and sees the evidence. It is an impossibility for an Appellate Court who is reading only a dry record which, as in this case, was a year and one-half old at the time the Appellate Court had it under consideration.

We respectfully submit that these cases should be returned to the supervisory discretion of the District Courts who at least have some familiarity with the school systems under their jurisdiction and have the testimony and the evidence freshly before them from day to day.

B.

Another aspect of this matter which we feel is important and should be considered by this Court is whether or not a school board which has demonstrated good faith progress in attempting to comply with the mandate of this Court as set forth in Brown and subsequent decisions should be penalized by so sweeping a decision, so detailed a decree, because some other school board in some other community, and even in some other state, can not demonstrate good faith compliance.

Because of legislative mandate, including "packing of the board" from 1960 through the end of 1962, this particular school board was hampered, if not completely prohibited, from taking any real affirmative steps in compliance with the Brown case and other decisions until 1963. However, as is shown by the record, immediately after the "unpacking" of the board, the new board, in good faith, took immediate affirmative steps to eliminate discrimination in its school system by presenting the court with a plan of desegregation which, at that time, met the standards of all existing Federal Court decisions. During the operation of the system under that plan, it handled each incident

or problem that arose in an affirmative manner looking toward full compliance, in spirit, as well as the letter of the court approved plan. When incidents arose between Negro and white students, these incidents were handled just as they had been handled for years. If it were possible to effectively determine the guilty student, that student only was punished. In cases where it was difficult to determine which student was actually at fault, it was handled just as with any other students, both of the students involved were disciplined.

When the question arose as to whether the Negro students would be permitted to play basketball together with the white students during physical education classes, the principals were advised that they would be permitted to do so and would be treated just as any other student.

When the question arose as to whether a Negro student would be allowed to become a member of and participate in the band at a previously all white school, the principal was advised that the student could do so just as any other student.

When the question arose as to whether, at senior high school graduation exercises, the Negro students would be seated together in one group on the stage, a meeting was held with the principals for a complete and candid discussion of this problem. The result of that meeting was that the principals were instructed to seat the students in alphabetical order without regard to race or color. As a matter of fact, the principals themselves felt that this was the best way to

handle the situation, regardless of objections from parents of some of the white students.

At this point, the plan for East Baton Rouge Parish seemed to be working smoothly and accomplishing the desired purpose. The great majority of Negro parents, as well as white parents, and also students, appeared to be satisfied with the progress of the plan.

When counsel for plaintiffs filed their second motion for further relief in 1965, the Board, although it contended that our plan was adequate and working satisfactorily, quickly presented a modified plan meeting the standards indicated by the court. Under that plan, all grades of the East Baton Rouge Parish School system would have been desegregated by the school year commencing September, 1968. All students, regardless of race, are permitted to attend the school of their choice within certain boundary limitations. These boundaries are established because of administrative and economic considerations and apply equally to all children living within that district. Each district contains at least two schools which any child in that district may attend. The children are notified in the spring of each year, primarily through their principals and teachers, that they may attend either of two specific schools during the next year if they so desire.

All assignment of students to buses because of race has been eliminated regardless of what counsel for plaintiffs may allege in their brief. Bus transportation is one of the more costly items of the school

board budget. Each year, the East Baton Rouge Parish School Board spends approximately $1,125,000.00 on bus transportation. Due to this cost, buses are assigned routes which serve particular neighborhoods and particular schools in order to keep the routes traveled by a bus as compact as possible in order to cut operating costs.

Furthermore, the board and staff, are recognizing their responsibilities under the mandate of the court and gradually, with experience, are obtaining a better idea of how to handle and solve the many complex administrative problems involved in this transition. An indication of this progress, given time and experience, is that the staff discontinued holding separate meetings for the white and Negro teachers and staff and have almost completed construction of an addition to the School Board office building for the purpose of moving all of the Negro supervisory personnel into the School Board office with the white supervisory personnel thereby eliminating discrimination in that area. We believe it important to note that the desegregation of teacher and staff meetings and the bringing of Negro supervisory personnel into the main School Board office on a non-segregated basis has been done voluntarily and without any admonition by the Court.

In addition, all signs for rest rooms etc. delineating a distinction between Negro and white have been eliminated. Furthermore, any designation or distinction or use of the term white and Negro has been eliminated from all forms, applications, reports etc. Commencing with September of this year all grades will

be desegregated and all Negro or white districts eliminated. All districts are now designated merely as school attendance districts. All committees appointed to study school problems contain both Negro and white personnel.

The good faith and cooperation of this particular School Board has been repeatedly recognized by the District Court having jurisdiction. Two years ago, in 1965, on the hearing of the motion for further relief which resulted in this appeal, District Judge West said:

> "All right, gentlemen, I see no reason to delay, except in the details involved in this case, what the order of this Court will be. Some details will have to be left to the School Board to work out, because as I have stated on numerous occasions, I don't propose to administer the school system of this parish. I think we have duly elected officials who are highly competent to do so, and I might add now, as I said a while ago and I have said in previous decisions, that the school board of this parish has been the most cooperative school board of any that I know, not only with this Court but with the colored people who have had any dealings with them, and they have abided by the Court's orders; and this is one of the very few places in the United States where the parish school system was desegregated without so much as a single picket appearing on the sidewalk in an area that foretold of all kinds of violence before it came about, and it was done peacefully, it was done in a gentlemanly manner by everybody concerned and I have commended them be-

fore and I commend them again. . . ." (C.R. VII, p. 242.)

Since then, as pointed out above, this particular Board has taken additional good faith steps that were not required by the Ditrict Court. All of this has been done in spite of phone calls, letters, cross burnings and other harassments of the class shown by Appendix VIII, p. 90. Are we now to be penalized by this sweeping decision and detailed decree in spite of the good faith cooperation and progress of this Board and its staff? If this is to be the reward for cooperation and good faith progress why should any school board anywhere cooperate or act in good faith? We are now, because of the decision and decree of the Court below, in no better position than the most recalcitrant school board.

C.

Since public education is a local matter and since Congress has not legislated with respect thereto, some provisions of the decree would seem to be completely beyond the power of a court under our system of government which provides for a separation of powers between the executive, judicial and legislative branches. Section VII of the decree of the Court below entitled "New Construction," CP Exhibit L, Jefferson II, p. 18, impliedly tells local school boards where they can and cannot build schools. If the opinion and decree of the Court below is allowed to stand, it is conceivable that some Court in the future will enjoin this School Board from utilizing a school or schools which are now in the planning stages as the construction of same may

have been prohibited by this decree. Section V of the decree, CP Exhibit L, Jefferson II, p. 16, regarding athletic programs, may open the doors of our schools to wide open proselyting of athletes even though high school and college athletic associations, both state and national, have been fighting this for years. The mailing of choice forms required by Section II of the decree, CP Exhibit L, Jefferson II, p. 8, is unnecessarily burdensome, both financially and physically and totally unnecessary. The requirement that a child make an affirmative choice each and every year rather than only when entering schools or changing from elementary to junior high or junior high to senior high is also unnecessary since every child *has the right* to change his choice at the beginning of any year. The report requirements of Section IX and elsewhere of the decree, CP Exhibit L, Jefferson II, p. 17, 19 & 20, are obviously designed to permit the plaintiffs, the NAACP, the Justice Department, and the Department of Health, Education and Welfare to police the administration of these local school systems. Requiring such reports is burdensome, unnecessary, and contrary to the historical concept of local control of public education.

D.

Even if this decree is allowed to stand in some form so as to specifically, directly and immediately affect the school boards whose cases were orally argued on the same day before the Court below, this School Board should not be bound by the decree of the Court below because it has never been properly consolidated with the other cases before the Court below. The United

States District Court for the Eastern division of Louisiana, Baton Rouge Division, should be left free to fashion, for this School Board, what it feels is necessary and proper after a full hearing thereon at the trial court level.

IV

A.

Heretofore, the courts in these cases have been dealing with the desegregation of school systems as operated by elected state and local officials over whom the courts had some control. The courts have been primarily dealing with people dedicated to preserving public education; superintendents, staff personnel, school board members, who would not suffer what they must with little or no pay, unless they were dedicated to public education. If, however, the opinion of the Court below is allowed to stand, requiring its ultimate forced integration or forced mixing of the races on some percentage basis, the Court will no longer be dealing with state and local officials or even dedicated public educators. The problem then will be with private individual citizens, some who care more, *some who could care less*, about public education. You will be dealing with their individual prides and prejudices and their resulting individual private discrimination. This, unfortunately may very well apply to teachers as well as to individual parents and students.

The opinion of the Court below touches briefly on this facet of the problem on pages 10 and 11 of the opinion, CP Exhibit L Jefferson I. p. 10 & 11, but then blithely moves on without further consideration

as though mere mention of the problem affords a solution. The Court below at page 10 says:

> "We approach decision making here with humility. *Many intelligent men of good will who have dedicated their lives to public education* are deeply concerned for fear that a *doctrinaire approach* to desegregating schools *may lower educational standards or even destroy public schools in some areas.* . . . The court is aware of the gravity of their problem. (1) Some *determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children.* These men flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit. *The flight of white children to these new schools and to established private and parochial schools promotes resegregation.* (3) *Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire.* (4) Many Negro children for various reasons prefer to finish school where they started . . ." (Emphasis added)

We certainly agree that these are grave problems, but we do not agree that they should then be blithely ignored. When the court says "some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. . . .", I cannot help but get the impression that the Court was thinking in terms of some well-known public figures whose anti-integration statements have been well publicized or perhaps members of the Ku

Klux Klan and the like. If this is what the court had in mind it is not seeing the trees for the forest.

Once the opinion of the Court below is permitted to stand, requiring its ultimate integration and mixing of the races on some percentage basis, probably population, many parents (not members of the Ku Klux Klan, the Citizens Council or the John Birch Society, but moderate law abiding citizens), seeing their children being bussed ten or fifteen miles to a Negro neighborhood and a predominately Negro school, will, very likely, allow their personal prejudices to come into play. They are likely to practice that private discrimination which the Constitution and *Brown* can not touch by taking their children out of the public schools and placing them in legitimate, established private or parochial schools. Of course, this will be expensive, perhaps too expensive for any but those of the middle income or higher group. If that group does, over the period of the next three to five years, take its children from our public school system, they will soon lose interest in voting taxes for financial support of a public education system which they are not using.

Many of our teachers, who may be financially independent because their husbands are employed, may refuse to go into Negro neighborhoods, at great distances from their homes, to teach in predominately Negro schools with predominately Negro faculties. They may choose to retire. With less taxes voted by the people for public education, the pay scale for public school teachers may drop far below that of private school teachers. This could also tend to discourage our

young people in college from going into the teaching profession or at least encourage them to seek employment in private, rather than public schools.

What will be the result of all this? The people who cannot afford private schools, the very ones *Brown* and the Civil Rights Act were supposedly designed to help, the Negro children, are left with an inadequately financed public education system, with inadequate facilities, inadequate equipment, inadequate supplies, and an inadequate number of even less qualified teachers. And, again, an important fact is that this will not be the result of action by public education or local public officials over whom the court can exercise some control, but the result of the private, individual prejudices of people, which, as must be obvious to everyone, have not been eradicated by all of the opinions of all the courts of this land or by all the legislative enactments of Congress.

Riots, demonstrations, violation of peace and order, destruction of private property, and repeated cries of "black power" of certain leaders of Negro organizations, constantly harden this private prejudice. In the midst of these trying times, the Court below injects a sudden and sweeping social change which was unnecessary and which will only harden private individual prejudice and crystalize private, individual opposition.

We respectfully suggest that only time and the efforts of men of good will of both races can accomplish what the Court below is trying to accomplish by judicial decree.

We further respectfully suggest that sweeping decisions such as this, to which many people strongly object, not on the basis of race, but on the basis of their violence to our Constitution, not only extend the time element, but build a wall between men of otherwise good will. We believe this to be particularly true in this case where the Court for the first time is leaving the men of good will in public education and reaching an area of private prejudice and discrimination over which it has no authority and no means of controlling.

The imposition of sweeping and sudden social change as wrought by *Jefferson* will not only not allow, but will prevent, the ultimate realization of Justice Frankfurter's statement in Cooper that:

> "By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences..."

V.

A.

Although certain officials of the United States Government, certain Congressmen, and certain educators may believe that it is educationally desirable to have persons of all races, creeds, religions, and national origins mixed in each school on some percentage basis, we respectfully submit that such proposition is not now properly before this Court.

It may be that in the future such legislation will be proposed to Congress at which time a fair hearing and debate on the merits of such proposition as to whether it is desirable, educationally, to compel a mix-

ing of the races in the schools, may be fairly heard and decided in the legislative halls of this nation. This would be a proper function of Congress, if Congress has power to legislate in such manner in this field. Only after such discussion and final passage of congressional legislation adopting such proposition, could that proposition be before this Court. Only then would this Court have before it, the very real constitutional question of whether or not Congress has authority to enact such legislation. As yet, however, Congress not only has not so spoken but has explicitly refused to so speak. *Civil Rights Act of 1964*, Section 401(b), 407. CP, Exhibit G, p. 101 & 105.

VI.

The Court below has conclusively assumed that school faculties must also be integrated by the deliberate assignment of certain teachers to certain schools with the sole criteria for such assignment being race although this Court has never held that the Fourteenth Amendment required the deliberate assignment of teachers to schools because of their race. Since 1954, there have been only five cases in which the question of faculty integration was raised and discussed by the Appellate Court. These five cases were *Bradley v. School Board*, 345 Fd. 2d 310 (4th Circuit, 1965), vacated and remanded on other grounds 86 S.Ct. 224 (1965), *Rogers v. Paul*, 345 Fd. 2d 117, (8th Circuit, 1965) vacated and remanded on other grounds, 86 S.Ct. 358 (1965), *Augustus v. Board of Public Instruction of Escambia County, Florida* 306 F. 2d 862, *Board of Public Instruction of Duval County of Florida*

v. Braxton 326 F. 2d 616, Cert. denied 377 U.S. 924 84 S.Ct. 1223 and *Calhoun v. Latimer* 321 F. 2d 302.

In *Bradley* (Fourth Circuit) and *Paul* (Eighth Circuit), the Court merely held that negro students had standing in Court to raise the question as to whether or not faculty assignments based on race violated their constitutional rights and remanded the case to the District Court for an evidentiary hearing thereon. In the *Escambia County* case, the Fifth Circuit set aside an order of the trial court dismissing allegations in the complaint seeking to put an end to the assignment of teachers and other personnel by race, holding that it was a matter of proper concern for the District Court. In the *Calhoun* case the Fifth Circuit held that the trial court did not err in postponing consideration of the teacher assignment question. That is exactly what the District Court did in the instant case. C.R. Volume VII, p. 246.

In the *Duval County* case the Fifth Circuit approved an order of the trial court prohibiting assignment of teachers by race as well as prohibiting construction which perpetuated, maintained or supported a school system operated on a racially segregated basis. This Court then denied certiorari. 377 U.S. 924, 84 S.Ct. 1223.

Except for the *Duval County* case, the Courts, including this Court, had only affirmed the standing of Negro students to raise the question of faculty desegregation and their right to an evidentiary hearing on that question. These evidentiary hearings, so for as we have been able to determine, have never

been held and the factual question of whether or not being taught by a Negro teacher is detrimental to a Negro student or violates his constitutional rights has never been determined. The dissent of Judge Jones in the *Duval County* case is particularly pertinent on this point as his dissent is based upon the original *Brown* decision of this Court. 326 F. 2d 616, 621. Only the Fifth Circuit, in only the *Duval County* case and this case, has by passed its former decisions as to these evidentiary hearings and assumed the proof of the fact without such proof having been made or such hearing having been held: Petitioner respectfully submits that there are practical as well as constitutional differences between student desegregation and faculty integration.

The question of ceasing to discriminate with respect to teacher assignment as compared to forcibly integrating the teachers in the schools is a most difficult problem. With students, a board can utilize a freedom of choice plan, a unitary school district plan, or a combination thereof, and accomplish the desired result of eliminating discrimination. However, with teachers, we are bound by our state teacher tenure law (L.R.S. 17:441, 442, 443) under which a teacher acquires tenure in her position after a probationary period of three years and an assistant principal or principal of a school also acquires tenure in a particular position after a period of probation. The existence of this law, some 20 odd years old, complicates an already complicated problem.

Even if you attempt to accomplish teacher de-

segregation purely on the choice of the teachers, how do you justify giving a Negro teacher a position in a particular school being occupied by a white teacher who is perfectly happy in that particular job and who is doing an excellent job in that position. Conversely, how would you justify putting a white teacher into a school and position presently held by a Negro teacher who does not want to be transferred. Such procedure is additionally intolerable if neither teacher wants to be transferred.

Furthermore, is it constitutionally necessary for Negro children to have a white teacher when they don't want a white teacher and are happy with the teacher they presently have? The converse would also be constitutionally questionable. However, the people most affected by this particular phase of the problem are the teachers themselves. What are the teachers' constitutional rights. Is it constitutionally permissible for a court to require a board to put a particular teacher in a particular school when the teacher herself does not want to teach in that particular school and her employer does not desire to put her in that particular school? Is this not a form of involuntary servitude?

Many teachers live close to the schools in which they teach and most of them, both Negro and white, prefer to teach in schools that are nearby. Many of our teachers, both Negro and white, are also mothers and prefer to teach in the same school that their children are attending or at least at a school very nearby. The reason for this is obvious. Transportation problems are less. The teacher can take her children to school

with her and bring them home with her in the afternoon. Is this benefit to the teachers themselves to be discarded because of some alleged damage to students without regard to the teachers' wishes. Even if there is some damage to the students, what about the corresponding damage to the teacher who is arbitrarily up-rooted from a position she is happily holding because of some arbitrary percentage allocation imposed by the courts.

I can see that these problems may not be as severe in the area of admitting new teachers to existing vacancies. However, even here it would appear that the wishes of the teacher, Negro as well as white, should be taken into consideration.

Furthermore, teachers in this parish, both Negro and white, are represented by at least three organizations; Louisiana Teachers Association, the Classroom Teachers Association and Louisiana Education Association. Before this Court proceeds to render any final and binding ruling as to desegregation of teachers, should not these organizations be represented before the court to express the teacher's view? In fact, should not these organizations be properly made a party defendant in these suits before any decision is rendered affecting their future as such desegregation, or integration, might do?

As an example of the importance of this matter to individual teachers who are also citizens with constitutional rights, we refer the Court to Appendix VII attached to this petition, entitled "St. Landry

Teachers association—A Protest" which was adopted only this month. This is the first reaction of the teachers in only one parish and has been proposed for adoption by the Louisiana Teachers Association.

As pointed out above, there are many additional problems inherent in teacher desegregation that do not exist with respect to student desegregation. The District Court in this case did not permanently refuse to hear evidence on this question, he merely postponed such hearing until a later time when the basic desegregation of schools with respect to students was further along and the School Board and staff had more experience and knowledge in working with these problems.

In view of the many practical problems involved in teacher desegregation, as compared to student desegregation, and particularly in view of what we consider as grave constitutional questions as to the forcing of a teacher to teach in a school where she does not desire to teach and where her employer does not desire for her to teach, defendants respectfully submit that this Court should not require teacher desegregation at this time, and should leave this question to be determined by the District Courts at a more propitious stage of this transition after the legal and Constitutional questions involved have been fully explored and after presentation of evidence at the trial Court level.

CONCLUSION

The decision of the Court below will drastically affect the future of public education in our entire nation. Its most drastic and immediate effect will be felt in the 17 so called southern and border states and in the large cities of the north, mid-west, west and east. However, this decision will also affect the life of every child, both Negro and white, and public education in our nation, presumably, forever. The net affect of the likely deterioration of public education will be felt by the nation as a whole.

This nationwide importance, possible disastrous result, together with its apparent conflict with principles previously stated by this Court, its obvious conflict with most of the opinions of the other Circuit Courts of Appeal, and its drastic reversal of its own previous decisions, necessitates a review of the opinion of the Court below by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN F. WARD, JR.,
Counsel For Petitioner

CERTIFICATE OF SERVICE

I, John F. Ward, Jr., attorney for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 20th day of June, 1967, I served copies of the foregoing petition for Writ of Certiorari on all attorneys for respondents by mailing same, postage prepaid, to their respective offices as shown below:

1. Jack Greenberg, Norman Amaker & James M. Nabrit, III, 10 Columbus Circle, New York, New York 10019
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JOHN F. WARD, JR.,
Attorney for Petitioner

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

CLIFFORD EUGENE DAVIS, JR., a minor by his father and next friend Clifford Eugene Davis, Sr., ET ALS

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL

CIVIL ACTION
NUMBER 1662

* * *

Once again this case concerning the desegregation of the public schools in the Parish of East Baton Rouge, Louisiana, is before the Court. On December 29, 1966, the United States Fifth Circuit Court of Appeals, by a two to one decision, handed down a most unusual decision—unusual because of its glaring inconsistencies, ambiguity, and sheer unconstitutionality. I refer to the case of *United States of America and Linda Stout, by her father and next friend, Blevin Stout v. Jefferson County Board of Education, et al,* _____F. 2d_____, with which six other cases were consolidated for hearing, and hereinafter referred to as the Jefferson case. The East Baton Rouge Parish School case was not involved in that decision. But by some stroke of magic, with no motion ever

having been filed for consolidation, the Baton Rouge case suddenly appeared consolidated with the other seven cases when the matter came up for "rehearing" before the Court sitting en banc. The en banc Court, by an eight to four decision, for all practical purposes upheld the original opinion. The dissenting opinions filed by Judges Gewin, Bell and Coleman clearly and meticulously point out the sheer absurdity and absolute unconstitutionality of the majority opinion. The majority opinion held that "The clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed'." But what it fails to state is that the same clock by which that Court is apparently working may well have "ticked the last tick" for true constitutional government in these United States. As Judge Gewin so aptly stated in his dissent, the opinion of the majority "has no substantial legal ancestors." There can, of course, be no such thing as true constitutional government in the United States if the Court is legally permitted, as that Court has done, to declare that the Constitution means one thing in seventeen states, and something else in the remaining thirty-three states. There are judges who have publicly stated their belief that the United States Supreme Court should, in fact, function as a "super legislative body" rather than as a court in the usual sense of the word. The majority opinion in the Jefferson case strongly indicates that there are those who believe that this should also be the function of the Courts of Appeals. When, in his dissent, Judge Gewin states that this decision "bends and twists the Constitution"

he exercises remarkable restraint. The fact is that the decision not only "bends and twists" the Constitution, it breaks and destroys it. It also defies and ignores the very Acts of Congress which it professes to be interpreting and enforcing. It completely ignores the constitutional requirement of separation of powers between the Executive Legislative, and Judicial branches of the Government when it undertakes to legislate as it has done in this case. And when it decrees that school boards (in the Southern and Border states only) must take affirmative action to "*integrate* students, faculties, facilities and activities" it either attempts to repeal, or it ignores completely the provisions of the Civil Rights Act of 1964 which specifically state:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C.A. 2000c-(b).
>
> ". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." 42 U.S.C.A. 2000c-6(a)(2).

The Court neatly sidesteps these specific impediments to the legality of its decision by simply stating:

> ". . . the equitable powers of the courts exist independently of the Civil Rights Act of 1964."

The utter ridiculousness of the opinion as it attempts to distinguish between the law as it applies to de jure segregation and the law as it applies to de facto segregation is readily apparent. The Court concludes that its opinion states the law only as it applies to the seventeen Southern and Border states—the states in which it says segregation is of the "de jure" type rather than of the "de facto" kind. It states that its opinion does not attempt to state the law as to the remaining thirty-three states where, it says, segregation is of the "de facto" type. It then proceeds to attempt to legislate an end to *all* segregation in the schools of these seventeen states, without regard to whether or not the segregation remaining after the implementation of desegregation orders is really de facto segregation. It even goes to the extent of ordering the local school boards to close certain schools under certain conditions, and instructing them how to choose locations for new schools. It is hard to reconcile their assertion that their opinion only applies to certain states, and not to others, when they say in another part of their opinion that "What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome." Should there be one law for Louisiana and another for

New York, and one law for Mississippi and another for Illinois?

But assuming by the use of legal doubletalk we could somehow conclude that under the law as it presently stands it is only de jure segregation that is unconstitutional, the question arises as to what is the status of the law in these seventeen states with regard to areas where segregation is maintained by *choice* on a de facto basis? Is the majority of the Court so oblivious of the facts as to believe that de facto segregation does not exist in areas of the South as well as in the North? Indeed, are they so oblivious of the facts as to believe that de facto segregation, that is, segregation *by choice*, does not exist in this very City of Baton Rouge? The majority opinion states that "The only school desegregation plan that meets constitutional standards is one that works." Suppose the school desegregation plan already in operation in a given area *is* working to the extent that all students do, in fact, have a free and unfettered choice of the school which he will attend, and suppose the situation arises where it cannot be fairly said that there any longer exists "de jure" segregation but that segregation *does* continue to exist on a neighborhood, de facto, free choice basis. In such an event, does such an area then join the Northern states against whom this decision is not intended to operate; or does the operation of the statute then become enlarged to cover such de facto segregation simply because the area involved is located in one of the seventeen Southern or Border states? By what criteria is it to be decided when de jure

segregation ends and de facto segregation begins? Are these questions to be determined by the method used by the Department of Health, Education and Welfare in applying their so-called guidelines, or will the school boards be given an evidentiary hearing in a court of law to determine such an issue? It must be remembered that the school boards were not given such an evidentiary hearing in the present case on the question of whether or not the H.E.W. guidelines should be applied to the schools involved. That issue was never presented to the District Courts in which these cases originated, the Courts in which, according to law, litigation is supposed to originate. The Court of Appeals, sua sponte, injected this issue into the cases for the first time while they were supposedly "on appeal" before it. In view of this procedure, it would seem logical to conclude that it is now the intention of the Court of Appeals to take over the function of the District Courts insofar as these school desegregation matters are concerned. Apparently insofar, at least, as cases involving desegregation of schools are concerned, litigation may now start at the appellate level. I respectfully express my doubt of the wisdom of this procedure and agree with Judge Gewin when he says ". . . due process and sound judicial administration require, at the very least, an evidentiary hearing . . . It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion." Judge Bell put it another way in his dissent when he said that this decision of the majority amounts to an

"adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking departure from even rudimentary due process."

The Jefferson decision is apparently the final step in the Fifth Circuit Court of Appeals' determination to bring about not, as the law clearly requires, an end to forced segregation in public schools, but instead a complete, forced, total integration of the faces in every school. It seems to matter not that the Congress has specifically decreed otherwise, and it seems to matter not that such a result has never been required or suggested under the Constitution or laws of the United States as interpreted by the highest court of the land. As Judge Gewin says ". . . All things must yield to speed, uniformity, percentages, and proportional representation. . . ." The decree of the majority shows an obvious "determination . . . to achieve percentage enrollments which will reflect the kind of racial balance the [*court*] seeks to achieve."

But this racial balance was never contemplated by Congress when it passed the Civil Rights Act of 1964. In explaining the Bill to Congress, the then Senator Humphrey said:

> "The Bill does not attempt to integrate the schools . . . The fact that there is a racial imbalance per se is not something which is unconstitutional."

But in the Jefferson case the majority of the Court said:

> ". . . the 'personal and present' right of the in-

dividual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education."

This statement is difficult to understand in view of the fact that prior to the Jefferson case, this same Court, on at least nine different occasions, specifically approved the holding in the case of *Briggs, et al v. Elliott*, et al, 132 F. Supp. 776 (E.D.S.C. - 1955) wherein it was specifically stated that:

"The Constitution, in other words, does not require integration. It merely forbids segregation."

Now, for some strange and obscure reason, without any change in the law having been made by either the Congress or the United States Supreme Court, the holding in Briggs suddenly becomes "dictum" by which the Court of Appeals says it is not bound, at least insofar as the seventeen Southern and Border states are concerned. It is apparently the law elsewhere, but not here. In explanation of this "switch" the Court said:

"However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of Briggs."

And then, in order to avoid the frustration involved in following the law as clearly stated by both the Congress and the Supreme Court, the majority of the Court in the en banc hearing neatly sidestepped the whole affair by simply stating, without any legal justification whatsoever, that:

"The Court holds that boards and officials administering public schools in this Circuit have the af-

> firmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinion distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. . . . To the extent that earlier decisions of this Court . . . conflict with this view, the decisions are overruled."

The conclusion now reached by the Court of Appeals that the statement contained in the Briggs case that "The Constitution, in other words, does not require integration. It merely forbids segregation" is merely dictum by which it is not bound is interesting indeed. I assume that if the statement in Briggs had been to the effect that the Constitution *did* require integration, it would also have been considered to be mere dictum. If so, it could, of course, have no precedential value. And if such a statement in Briggs is dictum and not binding, then of course it must necessarily follow that a similar statement of another court, such as the Fifth Circuit Court of Appeals is mere dictum and not binding upon other courts in future cases.

When judicial precedent and specific enactments of Congress can be so lightly and summarily cast aside, and when in their place can be substituted a decree whose obvious purpose, as noted by Judge Gewin in his dissent, is a "determination . . . to achieve percentage enrollment which will reflect the kind of racial balance the [*court*] seeks to achieve," I can only say that I wholeheartedly agree with Judge

Hutchinson when he said in *Denzel Milton Lee v. United States of America*, 322 F. 2d 770 (CA 5—1963):

> ". . . I emphatically condemn and reject the majority view as simply personal decreeing and, as such, alien to this Circuit and to the law generally and as completely unauthorized."

It is far too late for anyone to take issue with the fact that the established law of the land now requires that there be no *forced segregation* in public schools. But it is equally well established in law that neither the Constitution nor the laws of the United States of America require forced integration of the races in public schools. The law is clear. It requires that public schools be maintained and operated, not as Negro schools and not as white schools, but as public schools. It requires nothing more nor less than that within the bounds of proper school administration all students have a free and unfettered choice of the school he wishes to attend, and that he has the right to be assigned to the school of his choice without regard to his race, color, religion, or national origin. If the plan adopted by a school system employs this criteria, and if the freely exercised choice of students or parents results in de facto segregation, that is merely an example of freedom of choice in operation. It is just as important that one's freedom to choose a school that does not happen to suit the fancy of the Court be protected and respected as it is to protect the rights of those who elect to attend the schools which the Court, in its infinite wisdom, thinks they should at-

tend. The majority opinion handed down in this case gives one the impression that the Courts are the guardians of the educational processes employed in this country. Search as I may, I have been unable to find authority for the assumption by the Court of such a duty. The primary function of the Courts is to decide cases and controversies—not to administer the local school systems. Regardless of how "frustrated" the Court of Appeals may become as its experience in handling school cases increases, such frustration is, in my humble opinion, no justification for its taking over, "lock, stock and barrel," the operation of the public school systems. It is one thing to adjudicate disputes between litigants, and it is quite another to carry the modern day theory of judicial activism to the extent demonstrated in this case.

No one will dispute the fact that, in the past, Negro children have been short changed when it comes to educational opportunity, especially in the South. Congress has attempted to alleviate this situation by the passage of various pieces of Civil Rights legislation. It is up to the Courts to interpret those Acts, along with the Constitution of the United States, and demand compliance therewith. If the legislation passed by Congress is inadequate then it is, of course, the prerogative of Congress to change it. If the Constitution is inadequate, then it should be amended by proper constitutional process. But in neither case should this Court, or any other Court, take it unto themselves to usurp the powers and functions of Congress and to change the law to make it conform to the way *they*

think the law ought to be. That is what has happened in this case. If the law providing for an end to forced segregation in public schools does not work in such a fashion as to give every child, white and negro alike, an honest, opportunity to freely choose the school he wishes to attend, then the law should be changed by proper legislative proccdures. It should not be changed by the bending and twisting process indulged in by the Court in this case.

When, as stated by Judge Gewin, the Constitution and laws of the United States can be so easily "bent and twisted," it is difficult to disagree with Judge Bell when he says that the type of standards set by the Court in this case "places school systems under men and not laws."

But since the District Courts in the Fifth Circuit seem now to have been completely stripped of all discretion insofar at least as the cases directly involved in the Jefferson decision are concerned, and since, even though never consolidated by proper legal procedure the East Baton Rouge Parish school case has somehow been included within the ambit of that decision, this Court now has no alternative but to comply with the mandate issued therein. That mandate says:

> "The Court reaffirms the reversal of the judgments below and the remand of each case *for entry of the decree attached to this opinion.*"

I agree with Judge Gewin when he says the effect of this mandate is that:

> "The effectiveness of the District Courts has been

> seriously impaired . . . Now his (the District Judge's) only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree . . . and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment."

So, functioning in that capacity, I herewith enter the "detailed, uniform, stereotyped formal decree" that is attached to the majority opinion.

I concur with Judge Bell when he notes that because of the detailed character of this decree formulated by the Court of Appeals it is doubtful "that sufficient latitude is left to the District Courts to adjust such practical difficulties as may arise under the details of the decree." I can only assume that the Court of Appeals, whose decree I enter this day, has also assumed the duty of interpreting, applying, and enforcing compliance therewith as the need arises. While the decree does not specifically so state, I would nevertheless assume that the Court of Appeals does intend to retain jurisdiction over this matter for the issuance of such future orders and decrees as it may in its judgment deem necessary and advisable.

Decree will be entered accordingly.

Baton Rouge, Louisiana, May 8, 1967.

/s/ E. GORDON WEST
United States District Judge

APPENDIX II

Number of Negroes Registered in Each White School For Session 1963-1964

SENIOR HIGH SCHOOLS

	Grade 12
Baton Rouge High	14
Glen Oaks High	6
Istrouma High	3
Robert E. Lee High	4
TOTAL	27

Visiting Teacher Office
August 21, 1963

Number of Negroes Registered in Each White School For Session 1964-1965

SENIOR HIGH SCHOOLS

	Grade 11	*Grade 12*	*Total*
Baton Rouge High	20	17	37
Glen Oaks High	12	1	13
Istrouma High	2	0	2
Robert E. Lee High	4	5	9
TOTAL	38	23	61

Visiting Teacher Office
May 18, 1964

Registration Figures

Elementary Schools	*Grade 1*	*Grade 2*
Banks	78 (2)*	69 (2)
Dufrocq	37 (13)	27 (3)
Lanier	71 (1)	67
University Terrace	36 (6)	26 (2)
Westdale	26 (2)	32 (3)
Wyandotte	30 (1)	26
TOTAL	(25)	(10)

Senior High Schools	*Grade 10*	*Grade 11*	*Grade 12*
Baton Rouge Senior	534(44)	450(18)	473(22)
Glen Oaks Senior	276(10)	259(6)	217(11)
Istrouma Senior	582	557	509(1)
Robert E. Lee	245(5)	260(1)	224(5)
TOTAL	(59)	(25)	(39)

Total Number of Negro Registrants in Grades 1, 2, 10, 11 & 12—158

*The number in parenthesis is included in the first number listed.

August 16, 1965-66

ALW:bt

Number of Negroes Registered in Each White School For Session 1966-1967

ELEMENTARY

	Grade I	*Grade II*	*Grade III*	*Grade IV*	*Total*
Banks	3	3	4	1	11
Dufrocq	23	14	11	13	61
Lanier	0	0	0	0	0
University Terrace	7	4	1	2	14
Westdale Elementary	1	1	3	0	5
Wyandotte	4	4	0	5	13
TOTAL	38	26	19	21	104

SENIOR HIGH SCHOOLS

	Grade 10	*Grade 11*	*Grade 12*	*Total*
Baton Rouge Senior High	19	36	20	75
Glen Oaks Senior High	5	5	3	13
Istrouma Senior High	0	0	0	0
Robert E. Lee	26	7	1	34
TOTAL	50	48	24	122

Visiting Teacher Office
September 12, 1966

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

CIVIL ACTION NO. 1662

CLIFFORD DAVIS, ET AL.,
Plaintiffs,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Defendants.

BRIEF AMICUS CURIAE

May it please the Court:

The United States Supreme Court in *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, 358 US 101, 79 S.Ct. 221, by per curiam decision, affirmed the decision of the Federal District Court, 162 F. Supp. 372, 384, holding that the Alabama School Placement Law furnishes "the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered."

The Court noted that the placement law was "passed in an effort to meet and solve problems pre-

sented by the School Segregation Cases." (*Brown v. Board of Education*, 347 US 483, 74 S. Ct. 686 and *Brown v. Board of Education*, 349 US 294, 75 S. Ct. 753.)

Act 259 of the Legislature of Louisiana for 1958, as amended, was enacted after the Shuttlesworth case and contains in almost exact language the factors guiding student assignment which were attacked but upheld in the Shuttlesworth case.

The Supreme Court did not direct complete and universal integration at once, but directed that its interpretation of the Constitution be given effect with "*all deliberate speed*". The thoughtful consideration of those charged with the responsibility is thus necessarily involved and the primary responsibility for the conduct of the schools of this Parish is vested in the East Baton Rouge Parish School Board.

During the coming summer an election is to be held to choose the successors to present school board members, including both appointed and elected members, and this newly chosen board that will have charge of the conduct of the schools for four years should be allowed to implement the laws under which the schools are to be operated, with a reasonable certainty that such implementation will stand for the ensuing four years instead of being subject to almost immediate change.

We regret the decision of the Supreme Court in

the *Brown Case, supra.* We doubt that the Supreme Court, having once interpreted the Constitution as justifying separate but equal school facilities, ought to have felt itself free to strike down that decision especially in the face of the vast expenditures made by the States to comply with it. Nevertheless we recognize the duty of Your Honor to heed the mandate of the Supreme Court.

We believe that the mandate to proceed with all "deliberate" speed precludes the thought that the Courts will order desegregation at the uncontrolled wishes of Complainants. On the contrary we believe that Courts were directed to take into consideration the efficiency of the educational process, the ability of the student, the maintenance of true educational standards and other factors of vital importance to the community. On no other basis could the Supreme Court have approved the Shuttlesworth decision.

We believe an attempt to place every student in an integrated school without regard to his needs and qualifications would wreck the school system.

We believe that the interests of the community and its inhabitants of all races will be served by awaiting submission of a plan from a fully elected school board.

Accordingly, we suggest to the Court that, in keeping with the language and spirit of the Supreme Court decision, action herein should be deferred until 60 days

after the 1962 election of the East Baton Rouge Parish School Board.

Respectfully submitted,

/s/ C. C. BIRD

/s/ H. PAYNE BREAZEALE

/s/ C. V. PORTER

/s/ L. W. BROOKS

/s/ BEN R. MILLER

/s/ CALVIN E. HARDIN, JR.

/s/ CARLOS G. SPAHT

/s/ ROLAND C. KIZER

/s/ F. R. BLANCHE

/s/ G. T. OWEN, JR.

/s/ VICTOR A. SACHSE

CERTIFICATE

I, one of the attorneys on the foregoing brief amicus curiae, certify that copies thereof have been served on counsel of record for the plaintiff, namely: A. P. Tureaud, Attorney at Law, 1821 Orleans Street, New Orleans, Louisiana, and upon Miss Kathleen Ruddell, United States Attorney for the Eastern District of Louisiana and also upon District Attorney Sargent S. Pitcher, Attorney for the East Baton Rouge Parish School Board, and upon Attorney General Jack P. F. Gremillion, Attorney General of the State of Louisiana, by mailing a copy thereof with postage prepaid to each properly addressed.

Baton Rouge, Louisiana, March 8, 1962.

/s/ VICTOR A. SACHSE
Victor A. Sachse

APPENDIX IV

Baton Rouge Committee for Public Schools

DECLARATION OF PRINCIPLES

The United States District Court has ordered the School Board of the Parish of East Baton Rouge to present a plan for the orderly desegregation of public schools.

Our School Board has indicated that it will obey this order and will present a plan to the Court. However difficult this task may be, we believe that the School Board will be acting wisely, and in the best interest of the education and safety of our children, by presenting such a plan.

If the School Board should fail to present a plan, as ordered by the Court, this would not prevent desegregation of the schools. In that event, the Federal Judge would have no choice (under established law) but to devise a plan for our schools.

Our School Board was elected to direct public education and preserve our public school system. We believe that an acceptable plan, prepared by our own well-informed School Board, would be less disturbing to our community than a plan provided by the Court.

We support the School Board of this Parish for its dedicated and courageous service in this difficult situation.

* * *

Baton Rouge is now faced with the same situation that has recently confronted other Southern cities.

This Parish must now choose whether or not it will follow the path of law and order. What is done here now will determine the welfare, and the economy, of the entire Baton Rouge area for years to come.

We believe that the course to be followed, by our people and by our public officials, should be governed by the following principles:

1. *Public education must be preserved.*

   Our children are entitled to a schooling uninterrupted by violence and danger.

2. *Law and order must be maintained.*

   This requires compliance with the final decisions of our Courts. Any other course would result in violence and chaos.

3. *The right of parents to send their children to private schools should be recognized.*

   However, we believe that a private school system cannot become an adequate substitute for the public school system.

We join together in public support of these principles.

APPENDIX V

A DECLARATION OF PRINCIPLES

Relative to our Urgent School Problem

Public education in Louisiana must be preserved.

The people of each parish of the State, in accordance with the democratic concept of local self government, should be free to determine the basis on which their schools should be operated in compliance with the orders of the Federal Court.

Preservation of law and order in Louisiana requires compliance with the final decisions of the United States Supreme Court; any other course would result in chaos.

We believe that public education is reserved to the States and steps should be taken to enlist the aid and support of citizens throughout the nation with the view of eventual amendment of the constitution of the United States in order to preserve the right of the States in education.

Although the private school system cannot become an adequate substitute for the public school system, and much less supplant it, the right of parents to send their children to private schools should be recognized.

The time has come for the reasonable men and women of Louisiana to express their views and to assume positions of leadership in this critical social problem in order that unity may be restored to our people.

APPENDIX VI

NOMINATION FORM FOR THE NEA-THOM McAN SCHOOL BOARD AWARD

Grades are a necessary adjunct to school. Grading systems come in all kinds—those using grades as pinpointed as "98" or "62" and as broad as "S" and "U". Students are the primary targets for grading or rating, but the process does not stop with them: also graded are schools, school systems and many school employees.

And even school boards can be rated.

Few grades of "U" would be given to school boards anywhere, since, being an elected body, significant public disapproval would soon result in their unseating. The grade given would usually be "S": for "satisfactory."

But some deserve an "S" standing for something more than "satisfactory"—for, perhaps, "special," or "superior," or even "superb!"

The East Baton Rouge Parish School Board's "S" mark surely stands for this last-named quality—"superb."

Twenty-five years ago, the local school board represented people of a sleepy little river parish lolling on the banks of the Mississippi—an easy-going parish. Today East Baton Rouge Parish, is an emerging giant made up of 275,000 individuals—increasing at the rate of 300 new families a month. In less than a quarter century, the school population has jumped from 18,000 to 58,000; school properties from $2,600,000 to

$70,812,000 in value and instructional school personnel from 830 to 2,591 employed.

It is easy, during a time of such tremendous expansion, for a school board trying to keep up with burgeoning needs to feel overburdened. Simply keeping up, under the circumstances, is termed "satisfactory." But consider a school board under such urgent necessities not only keeping up with, but outpacing the needs. This has been the accomplishment of the East Baton Rouge Parish School Board. In planning, in administration, in support of consistent betterment of each facet of the educational program, they have excelled.

Perhaps their most clearly realized accomplishment so far lies in the upgrading of salaries and of personnel—both in quality and in number.

Teacher-pay in Louisiana, being lower than the national average, results in the loss of many good teachers to industry, as well as loss of good potential teachers to colleges other than colleges of education. The East Baton Rouge Parish School Board, by doing an outstanding job of promoting a local sales-tax in support of teacher-pay and various enrichment programs, in face of great opposition, was instrumental in a substantial local salary increase in 1966, making the parish a drawing-card for the better teachers in the area. In securing passage of the sales-tax proposal, board members presented two round-tables on television, and had more than thirty individual speaking engagements, and also contributed substantially to the cost of the campaign as individuals.

Our local salary schedule now averages $800.00 above the state minimum. The sales tax will yield this school year $4,700,000 and is expected to yield $5,381,000 in 1968-69. This gives the school board a permanent source of revenue for upgrading the number and quality of teachers locally employed.

In addition to better pay, school enrichment programs have been emphasized. In 1966, East Baton Rouge Parish elementary schools were WITHOUT ONE SINGLE ELEMENTARY LIBRARIAN. This year, TWENTY-SIX NEW ELEMENTARY LIBRARIANSHIPS were created, to be followed next year by TWELVE MORE, and ANOTHER TWELVE the next to make FIFTY. COUNSELORS increased from thirty-nine in 1965-66 to FIFTY-ONE in 1966-67, with a planned total of FIFTY ADDITIONAL COUNSELORS by 1967-68, several to be placed in elementary schools, which in 1965-66 had none.

The parish ELEMENTARY PHYSICAL EDUCATION program had NO certified physical education personnel previous to 1965, but now has SIXTEEN, and plans for a total of FIFTY by 1969.

The ELEMENTARY AND JUNIOR HIGH SCHOOL MUSIC PROGRAM "shared" a few teachers of music. A total of TWELVE additional elementary music teachers are planned by 1969.

Additional teachers to be hired by 1968-69 in these four areas alone number 162.

Unlike some other states, Louisiana has no mandatory kindergarten program. A START toward a

LOCAL SUMMER KINDERGARTEN program, parish supported, was made in the summer of 1966. A SIX-WEEK PROGRAM at centrally-located elementary schools involved 244 teachers teaching 3400 students.

Great strides are also apparent in the local ADULT EDUCATION PROGRAM. From 1965-66 to '66-67 STUDENTS INCREASED from 412 to 1,336; TEACHERS, from 19 to 55; and CLASSES, from 19 to 55, while the MONEY expenditure rose from $4,747 to $40,000.

In order to help get the sales tax passed, the East Baton Rouge Parish School Board published a brochure explaining "59,000 Reasons" (each reason, a student) that the local voters should support their program for a progressive school system. A copy is attached. Because of the tremendous effort and interest of the East Baton Rouge Parish School Board the goals listed in this brochure are fast becoming realities.

And all of this was done as the East Baton Rouge School Board provided leadership for integrated efforts among the teachers. Negroes and Whites worked in close association to get this program for enrichment enacted. Not once did they consider so limited a goal as just a teacher pay raise alone. ALL the goals listed in the brochure were backed by ALL the teachers—backed not only by moral support but by financial support ($12,000 worth) to advertise the program. Leading the move toward support of the goals was the school board, "digging down deep" and digging down FIRST to spearhead financial support.

Students—59,000 of them—were the "reasons" for the school board's goals. The SALES TAX, in large measure because of the actions and interest of the East Baton Rouge Parish School Board, IS A REALITY; the GOALS, again "because of the actions and interest of the East Baton Rouge Parish School Board," ARE FAST BECOMING REALITIES.

APPENDIX VII

St. Landry Parish Teachers Association
Opelousas, Louisiana

A PROTEST

We, the members of the St. Landry Parish Teachers Association do hereby, protest the discriminatory application of guidelines written by HEW and subsequent decree of the U. S. 5th Circuit Court of Appeals imposed by the U. S. District Court, Western District of Louisiana, on the teachers of the St. Landry Parish School System, members of the Board, the administrative staff and the parents and children of St. Landry Parish. We, herewith, set forth the grievances committed against us by the aforesaid guidelines and courts. We appeal to our governmental agencies, executive, legislative and judicial, and to our citizenry to work together to correct or eliminate these grievances:

(1) The constituted authority of the school boards has been superceded by HEW's guidelines and the Court Order, Civil Action 10,912. The educational objectives of the School Board are and have been nullified. The court order takes from that body the authority to locate school construction where it is economically feasible, freedom to hire the best qualified teacher for a specific position, or reassign teachers where they can be happy and successful in their work. Further, it mandatorily orders that races must be mixed on a proportional representation of administration, teachers, and pupils.

(2) "Tenure of teachers in the system shall not

be used as an excuse for failure to comply with this provision." This portion of the decree summarily destroys the teachers contractual rights and is ex post facto with respect to such rights.

(3) The voiding of contractual rights and the discriminatory and arbitrary reassignment of tenured teachers as stated in the decree, will deprive these teachers of financial security through relocation of residence, and the ancillary disruption of the families' religious, social and civil connections.

(4) Any implementation of the principles of reassignment can only lead to early retirement of our most dedicated and experienced teachers, wholesale resignation of those not eligible for retirement, and the nullification and abortion of our recent recruitment drives for teacher vocations. The present shortage of qualified teachers along with the aforementioned conditions will lead to chaos and the complete destruction of our school system.

(5) The purported reasons for these guidelines are to eliminate race as a consideration in the operation of our schools, however, the decree is self immolating, in that proportional assignment of teachers and students are mandatory.

(6) The unilateral application of non-statutory guidelines as issued by HEW and subsequently encompassed in the decree of the Fifth Circuit Court of Appeals is without legislative origin and the carte blanche extension of such guideline authority in the future destroys the principle of "government insti-

tuted among men, deriving their just powers from the consent of the governed" upon which the very foundation of our government was laid.

In conclusion we hold that the 14th amendment to the United States constitution applies to all men of all races and of all creeds, and regardless of previous condition of servitude (including teachers) and that our rights as employees and citizens should not be abrogated in an attempt to secure privileges of a particular group.

APPENDIX VIII

KU KLUX KLAN REPORT

ST. ANTHONY HIGH SCHOOL HAS WATER CUTOFF

A heart-broken integrationist priest recently announced closure of St. Anthony High School in Baton Rouge due to a sudden financial crisis–responsible minded Catholics rejected their priest's mixing plans and withdrew financial support from the school. Knowing this action will deter mixing plans in other schools as well, the KKK commends those parents who had the fortitude to standup and be counted.

VIC BUSSIE DEFEATED ONCE MORE

The AFL-CIO carpet bagger, who represents himself and not the men of his union, has been dealt another bitter defeat (along with McKeithen, Schiro, and Dumas) as the conservative state legislature turned thumbs down on urban renewal. Some representatives say that if you want a bill defeated just get "kiss-of-death" Bussie to support it.

RED CHINA AND THE NUCLEAR BOMB

Of the 14 Chinese scientists associated with the development of Red China's nuclear bomb, 12 received their scientific training in foreign universities. Among those universities are Cambridge, University of California, California Institute of Technology, Massachusetts Institute of Technology and Princeton.

A GOOD IDEA

It has been suggested that Mr. Robert Aertker, East Baton Rouge Parish Superintendent of Education, and his flunky school board members resign their positions and teach at Scotlandville High School this fall. The KKK agrees and feels sure that they will be well qualified. Mr. Aertker resides at 8864 Trinity Avenue, Baton Rouge; his phone number is WA 4-1845.

TWO-TERM AMENDMENT

It is estimated that of the total votes recently cast for Amendment No. 1 only 27% were actually casted in support of our present governor. Total cost of that preliminary campaign: $550,000.00, a large fraction of the more than $1,800,000.00 which backers have invested in McKeithen.

McKEITHEN-AYCOCK DEAL

Many conservatives were amazed and disgusted upon learning that Taddy Aycock was withdrawing from the governor's race. Many conservatives wonder why Mr. Aycock was withdrawing. Could it possibly be for $100,000.00 cash and the understanding that Big John would step down in 1970 and run against Ellender for the U.S. Senate seat?

PREDICTION

Watch for once a week segregationist Russell Long to come out 100% *against* Big John in the governor's race. Many doubt that this would help him in his own endeavors—he's too far gone.

B-968, 6-67

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 301

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, et al., JEFFERSON COUNTY BOARD OF EDUCATION, et al., and THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, DORIS ELAINE BROWN, et al., GEORGE ROBERT BOYKINS, et al., and LINDA STOUT, by Her Father and Next Friend, BLEVIN STOUT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

REID B. BARNES,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, et al., JEFFERSON COUNTY BOARD OF EDUCATION, et al., and THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, DORIS ELAINE BROWN, et al., GEORGE ROBERT BOYKINS, et al., and LINDA STOUT, by Her Father and Next Friend, BLEVIN STOUT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

The Board of Education of the City of Bessemer et al., Jefferson County Board of Education et al., and the Board of Education of the City of Fairfield et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled causes on March 29, 1967.

CITATIONS TO OPINIONS BELOW.

No opinions were written by the District Court.[1] Two decisions were rendered by the Court of Appeals. The original decision of a panel of the Court (Record, Vol. IV, p. 6) is reported at 372 F. 2d 836, and is printed in Appendix L to the petition in **Caddo Parish School Board v. United States**, filed in this Court in June, 1967. The opinions on rehearing by the court en banc (Record, Vol. IV, p. 12) is not yet reported, and also is printed in Appendix L to the petition in **Caddo Parish School Board v. United States**. Since the petitioners herein were consolidated in the Court of Appeals for purposes of argument and decision with petitioner in **Caddo Parish v. United States**, these petitioners ask leave to incorporate herein by reference Appendix L to the petition in **Caddo Parish.**[2]

JURISDICTION.

The original judgments of the Court of Appeals were entered on December 29, 1966 (Record, Vol. IV, pp. 7A-7C). A timely petition for rehearing en banc (R. Vol. IV, p. 8) was granted (R. Vol. IV, p. 9). The judgments of the Court on rehearing en banc were entered on March 29, 1967 (R. Vol. IV, p. 13). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

---

[1] The District Court orders from which the appeals to the Court of Appeals were taken are at the following pages of the Transcript of Record: **Jefferson County**, Transcript Vol. I, pp. 70-71; **Bessemer**, Transcript Vol. II, pp. 85-86; **Fairfield**, Transcript Vol. III, pp. 65-66.

[2] Citations herein to the opinions below will include references to page numbers of the slip opinions printed in Appendix L.

QUESTIONS PRESENTED.

1. Whether the sole measure of the constitutional adequacy of a method of student assignment in public schools is that it results in a prescribed number of percentage of Negro children at schools with white children or a progressive change in the racial ratios of students ultimately removing racial imbalance or concentration.

2. Whether the Fourteenth Amendment imposes upon Negro children who freely choose to attend certain schools a duty to attend other schools in order to eliminate racial concentrations or imbalances in the schools chosen by them.

3. Whether a "freedom of choice" method of student assignment whereby all children have the unrestricted right to choose annually to attend any school in the system is rendered unconstitutional solely because it does not achieve prescribed percentage or numerical results reducing or removing racial imbalances or concentrations.

4. Whether an unrestricted "freedom of choice" method of student assignment must be combined with a neighborhood school or geographic zone method of assignment in order to be constitutionally adequate.

5. Whether there is a constitutional distinction between the existence in Northern school systems of racially imbalanced schools under "neighborhood" assignment plans and the existence in Southern school systems of similarly imbalanced schools under "free choice" assignment plans such as to require elimination of the imbalance in the Southern schools but not in the Northern schools.

6. Whether the requirement by a court of appeals of a detailed decree to be applied uniformly to every school system in the circuit without affording an evidentiary hearing as to the necessity or the effect of its provisions

on local educational and administrative functions unrelated to race is consistent with **Brown v. Board of Education** and other decisions of this Court.

7. Whether questions concerning the validity and propriety of the Court of Appeals' adoption of the so-called "1966 Guidelines" of the Department of Health, Education and Welfare were properly before and appropriate for decision by the Court of Appeals although the "Guidelines" were not issued until after the appeals were docketed, and, if so, whether such "Guidelines" are valid and within the Congressional intent of the Civil Rights Act of 1964.

8. Whether it is proper for a federal appellate court to adopt present and future regulations issued by the Department of Health, Education and Welfare for administration of federal funds under Title VI of the Civil Rights Act of 1964 as the court's constitutional standards in determining rights under the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is Section I of the Fourteenth Amendment to the Constitution of the United States. The statutory provisions involved are Sections 401, 407, 601, 602, and 604 of the Civil Rights Act of 1964, 78 Stat. 246. They are printed in Appendix A, *infra*.

STATEMENT.

Each of the petitioners is a local school board in Jefferson County, Alabama. These actions were commenced by complaints filed in the spring of 1965.[3] The

[3] The Bessemer complaint was filed on May 24, 1965, the Jefferson complaint on June 4, 1965, and the Fairfield complaint on July 21, 1965.

District Court, per Judges Lynne and Grooms, granted (with virtual consent of defendant's counsel)[4] the relief as prayed and ordered the submission of desegregation plans. The plans filed by the Boards several days thereafter were considered by the District Court to be consistent with the requirements of the Fifth Circuit's decisions as of that time,[5] and the objections of the plaintiffs and the United States accordingly were overruled. Appeals from these orders were taken in the Bessemer and Jefferson cases and on August 18, 1965, the Court of Appeals remanded each for consideration in light of two recent Fifth Circuit decisions. In accordance with the mandates of the Court of Appeals, the plans in **Bessemer** and **Jefferson** were amended on August 27, 1965, and on the same day the District Court held the amended plans to be in compliance with the Fifth Circuit decisions and entered orders overruling objections to them.[6]

The present appeals were taken by the United States from the orders of overruling objections entered on August 27, 1965, in **Bessemer** and **Jefferson**, and on August 18, 1965 in Fairfield.[7] The Negro plaintiffs never appealed

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[4] See, for example, Record, Vol. II, pp. 127-28.

[5] And they were consistent with the Fifth Circuit decisions. See, *e. g.*, **Armstrong v. Board of Ed. of Birmingham**, 323 F. 2d 333, 333 F. 2d 47; **Lockett v. Board of Ed.**, 342 F. 2d 225 (5th Cir. 1965).

[6] The plans contained no provision for faculty desegregation, but they were filed and the present appeals were taken from orders entered before this Court's decision in **Bradley v. School Board of City of Richmond**, 382 U. S. 103 (1965), and **Rogers v. Paul**, 382 U. S. 198 (1965), and at a time when the Fifth Circuit did not require provisions for faculty desegregation, see **Lockett v. Board of Ed.**, supra.

[7] Because of this Court's often expressed concern for time in school cases, the considerable lapse of time between the date of the orders appealed from and the date of the Fifth Circuit's decision now sought to be reviewed deserves an explanation. Much of the delay is attributable to the United States

from these orders. They moved to intervene, however, when the appeals were set for argument.

These three cases were consolidated on appeal with four cases involving Louisiana school boards, and a panel of the Court of Appeals rendered a decision (with one dissent) reversing all of the cases and directing the District Courts to enter a uniform decree appended to its opinion. A petition for rehearing en banc was granted and on March 29, 1967, a majority of the court en banc entered a per curiam opinion adopting the panel's opinion and decree with minor "clarifying statements". Three members of the Court dissented and one concurred in the reversal but disagreed with the substance of the opinion.

Although the two majority opinions discussed many questions, their substance was that Southern school systems have, by reason of their previous practice of segregation, a constitutional duty to achieve what the court termed "substantial-integration", which is to be measured by the numerical or percentage results obtained. Overruling its prior decisions holding that the Fourteenth Amendment only prohibits enforced segregation but does not compel actual integration, the court held further that an unrestricted "freedom of choice" plan is constitutionally inadequate unless it achieves the required results. The decision and decree were intended to be applicable uniformly to all school systems in the circuit.

The original desegregation plans and the facts appearing before the District Court are not only out-of-date but

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which utilized through extensions the maximum permissible time for noticing and docketing the appeals—thereby consuming a period of some seven months before the appeals were docketed. The cases were argued before the panel on May 23, 1966, and another seven months elapsed before the decision was rendered on December 29, 1966. Arguments on rehearing en banc were heard on March 10, 1967, and the judgments on rehearing entered on March 29.

are immaterial to the decision of the court below and to the issues raised in this petition. They are out-of-date because the appeals were taken immediately after adoption of the plans and before they could be administered or their effects could be gauged. The record therefore does not reflect the changes adopted by the Boards in their administration and resulting in their liberalization.[8] More important, the only facts either material to or mentioned in the decision below were that the school systems involved (as well as all other systems in the South) were previously segregated by law and that the numerical results of their plans were insufficient. The opinion was not premised on any determination that the petitioners were **still** operating "de jure" segregated schools at the time of the decision, but on the fact that they **previously** had "de jure" segregation. The decision did not purport to be merely based on or limited to any factual circumstances peculiar to only the particular school boards which were parties. It was based instead on broad constitutional principles which are intended to govern all school systems in the circuit without regard to variations in details of factual circumstances. Likewise, the existence of the good faith of the school boards is immaterial to the decision. The only test of the constitutional adequacy of a board's desegregation efforts is the objective results, not whether the board has acted in good faith. The opinion does not mention the existence or absence of good faith by the petitioner boards, and the records of the present cases in the District Court contain nothing evidencing anything other than good faith.[9]

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[8] As they have been administered since the appeals were taken, the plans have afforded all students an annual right to choose any school in the systems. This right has not been limited by any tests or other criteria of any sort. So far as we are aware, no student's choice has been denied for any reason.

[9] The plans adopted by the petitioner boards at the time of these appeals in 1965 were held by the District Court to conform with the Fifth Circuit's previous decisions.

Nor are the nature of the plans adopted in 1965 or the evidence in the District Court material to the issues raised by this petition.[10] Petitioners do not contend now, and did not maintain in the court below, that certain details of those plans are now sufficient in the light of developments in the law subsequent to the appeals, such as the decisions concerning faculty desegregation. The points raised here thus are not that the old plans are facially adequate, but that the new constitutional standards required by the Fifth Circuit are improper—particularly as they relate to the student assignments.

REASONS FOR GRANTING THE WRIT.

Petitioners are fully aware of the extent of the Fifth Circuit's experience with school desegregation suits. As its opinions themselves recognize, however, its decision in the present cases marks a far-reaching and substantial departure from any previous decision by it or any other federal appellate court. It admittedly establishes for this circuit new concepts of the nature of the constitutional standards and the forms of remedy which will govern public schools. Particularly with regard to questions of student assignment, it is believed that the constitutional standard adopted by the Court of Appeals is based on a misconception of the fundamental nature of the constitutional right established in **Brown v. Board of Education.** In any event, however, the decision is in direct conflict in this respect with recent desegregation decisions of the

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[10] There was evidence in the District Court on behalf of the respondents aimed at showing the physical inferiority of predominantly Negro schools. Due to insufficient time, however, the District Judge was unable to allow the petitioner an opportunity to present evidence in rebuttal (See Record, Vol. II, pp. 259, 265, 267). Accordingly, when petitioners disputed on appeal that the schools were inferior, counsel for the United States, Mr. David Norman, acknowledged during the original oral argument that the cases should be remanded for further evidence on this question.

Fourth and Eighth Circuits and conflicts at least in principle with decisions of other circuits. Moreover, its importance is clear: the decision and the detailed decree affect not only the petitioners but are expressly directed by the court to be followed by every school system in the six states comprising the circuit; and by reason of the principles on which it is premised, it unquestionably would apply to most of the school systems in the Fourth and Eighth Circuits and should apply to school systems in every other circuit in which schools with racial concentrations now exist.

I.

The Requirement by the Decision Below of Substantial Quantitative Integration Is Erroneous and Conflicts With the Decisions of the Other Circuits.

A. The Decision Imposes New Constitutional Duties on the Schools and on the Students.

Despite its length and discussion of numerous subsidiary questions, the decision of the court of appeals rests on several fundamental points. The most basic is its determination that the Fourteenth Amendment and decisions of this Court require the achievement of "substantial-integration" in terms of favorable statistics showing the numbers of Negro children who attend certain schools. Corollarily, it holds that a so-called freedom-of-choice method of student assignment—and, indeed, any other method of assignment—is constitutionally insufficient in Southern states unless it results in "substantial-integration." A subsidiary but related point underlying the decision is that the constitutional requirement of "substantial-integration" applies only to schools in states which **previously** permitted or required school segregation by law (characterized as "de jure segregation") but not

to schools in states which in 1954[11] had no laws requiring or permitting segregation (characterized as "de facto segregation"). Also related is its reliance on Title VI of the Civil Rights Act of 1964 as a congressional recognition of a requirement of substantial-integration in the Southern school systems but not in the North. Another major aspect is the decision for the first time in any school case that a minutely detailed decree be dictated by an appellate court for uniform use by all school systems in the circuit without reference to or regard for local differences and needs.

The main thrust and basis of the decision are that the Fourteenth Amendment requires in the South "substantial-integration" and that any means of student assignment in the South is unconstitutional if it does not meet that requirement. Its keystone is the principle reiterated throughout the opinion that, "The only school desegregation plan that meets constitutional standards is one that **works**,"[12] and that, "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the **result**."[13] The nature of this constitutional duty and the court's meaning of one that "works" is explained as being that:[14]

> [T]he law imposes . . . an **absolute duty to integrate** in the sense that a **disproportionate concentration of Negroes** in certain schools cannot be ignored; racial

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[11] Thus, it distinguishes **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir., 1964), on the ground that it involved "de facto" segregation even though that school system had operated segregated schools permitted by law as late as 1949 (page 63; 372 F. 2d at 873).

[12] Page 7; 372 F. 2d at 847.

[13] Page 112; 372 F. 2d at 894.

[14] Page 6, n. 5; 372 F. 2d at 846-47.

> mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition on the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration."

The decision then predicates the achievement of "substantial-integration" and the constitutionality of a school system on the attainment of prescribed percentages of Negro students in attendance at schools with whites:[15]

> In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the [HEW] Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools.

Finally, if these quantitative results are not achieved, the decision requires the adoption of whatever means are necessary to accomplish them. The panel's opinion thus concludes:[16]

> If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park.

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[15] Page 95; 372 F. 2d at 115.

[16] Page 115; 372 F. 2d at 895-96.

Adopting the panel opinion, the rehearing opinion added with regard to the percentage requirements:

> The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

The substance of the decision, then, is that while the achievement of a perfectly proportionate balance is not necessarily required, yet the elimination of imbalance and the achievement of a certain prescribed degree of "racial mixing" ("substantial-integration") is constitutionally mandated.[17]

In the context of an unrestricted "free choice" plan, the concomitant to this requirement is that a similar duty is constitutionally required equally of the children (colored and white) as of the school officials and that the achievement of "substantial-integration" is required without regard to—and, indeed, notwithstanding—the students' individual choices and preferences. School officials are required to compel all children to attend certain schools to the end that "substantial-integration" may be achieved, notwithstanding that the children have affirmatively chosen the schools they attend. If their choices do not measure up to the court's concept of "substantial-integration," a means of assignment must be adopted which will force them elsewhere. Realizing this effect of its decision, the rehearing opinion concludes: "A school child has no inalienable right to choose his school." This

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[17] Of course, whether the percentage requirements are characterized as a "rule of thumb" or as a strict condition is immaterial to the fundamental constitutional question which they raise—whether the Fourteenth Amendment requires quantitative results.

conclusion evidently is based upon the court's reading of the **Brown** decisions and the Fourteenth Amendment as subordinating the rights of individual Negro students to a theoretical group right of "Negroes as a class" to an integrated education.[18]

These principles not only form the basis of the decision, but also are manifested in certain provisions of its uniform decree. Thus, Section II (d) of the decree already requires the replacement of freedom of choice with a geographic zone or a neighborhood school assignment plan subject to a right of transfer through exercise of the choice procedures; it requires assignments by residence unless a student affirmatively chooses to go elsewhere.[19]

The practical effect of blindly requiring quantitative integration without regard to other considerations can be demonstrated by the results of the choices made in the Bessemer system for the 1967-68 school year—which will be the third year Bessemer has used freedom of choice. The choice period was held from May 1 to June 1, 1967, and all of the requirements of publicity, letters, forms, etc., dictated by the Fifth Circuit's uniform decree were followed. All grades were included. Of the total Negro enrollment of 5,127 in the Bessemer schools, the number of students returning their choices was 3,348. Of that number, only 146 chose to attend predominantly white schools. A total of 3,202 Negro students affirmatively

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[18] This view of **Brown** as a governing basis of the decision is evident throughout the panel's opinion and is discussed there in detail at pages 46-59, 372 F. 2d at 866-70. For example, it maintains that the "right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education." It is never explained who comprises this class if it is not the individual Negroes.

[19] Section II (d) provides in pertinent part that:

"Any student who has not expressed his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available. . . ."

chose to remain in their former schools. The percentage "results" are: only 4.17% of the students in Bessemer have selected desegregated schools.[20] Since this of course falls far short of the Court's concept of "substantial-integration" as demanding that "15 to 18 percent" of the pupils select desegregated schools in systems using free choice plans for two years, the decision expects the Bessemer system to adopt **now** another method of assignment which will accomplish the required results. In doing so it presumably will override the expressed choices of the 3,202 Negro students who elected to remain in their present schools and compulsively assign them elsewhere.

In assessing the meaning of this, it is to be noted that the personal reasons actually motivating the students' choices are not revealed anywhere in these cases, were not considered or mentioned by the Court of Appeals, and indeed are rendered altogether irrelevant by its determination that the quantitative result is the only constitutional concern. It seems impossible to read any such meaning into **Brown** unless the Court of Appeals is interpolating a **conclusive** presumption that the choices made by the Negro children were caused solely by fear, intimidation, or other extraneous pressures. But there is not the slightest indication in fact that the choices made by students in the petitioner systems have been influenced by anything except genuine preference. On the contrary, a recent report of the United States Commission on Civil Rights[21] reveals that reasons given by Negro children in actual interviews included the desire to remain with their friends, to continue their participation in school activities, and a feeling of identification with and pride in a particular school for the usual reasons any student identi-

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[20] This includes 67 other students who attended predominantly white schools last year and will return next fall.

[21] **Survey of School Desegregation in the Southern and Border States, 1965-66** (Feb. 1966).

fies himself with the school he attends.[22] However unimportant these reasons might seem in comparison with other educational purposes, it hardly seems proper for a court to arrogate to itself, especially under the guise of enforcing constitutional rights, the authority to determine that the Fourteenth Amendment prohibits a child from associating with his friends. Since there has been no opportunity for any evidentiary determination as to whether freedom of choice in the present school systems does not in fact serve the preferences and interests of the students, no one (including the court below) is in a position now to adequately appreciate or anticipate the actual effect which the court's requirement of quantitative results will have on the students themselves.[23]

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[22] See also, Bickel, "The Decade of School Desegregation," 64 **Colum. L. Rev.** 193, 213-15 (1964).

[23] The danger of such precipitate action by an appellate court on the basis of theoretical concepts and without consideration of individual factual circumstances is illustrated by an occurrence this spring in the school system of Okaloosa County, Florida. There, in accordance with a desegregation plan adopted pursuant to H. E. W. requirements, the school system closed a formerly all Negro high school (Combs) and assigned all its 107 Negro students to a formerly all white high school for the 1966-67 school year. On May 9th, the Civic League of Fort Walton Beach, a Negro organization, petitioned the school board to reopen the closed Negro high school and to allow the return of its Negro students. The Negro spokesman explained that they were "not fighting integration, but rather wanted each student to have **the right to attend whatever school he wishes.**" Fort Walton Beach, Florida "Playground Daily News," May 10, 1967, p. 1, col. 4. The basis of their request, as set forth in the petition, was that of the 107 Negro students who had previously attended Combs school but were required to attend a different school this year, 46 had dropped out of school as of March 3 (Page 30 of the Petition filed with the Board of Public Instruction of Okaloosa County, Florida). This was stated by the Negroes' petition to represent an increase of 2,033% in the number of dropouts in the Negro students formerly attending Combs High School during the 1966-67 school year as compared with the school years from 1962 to 1966. *Ibid.* The Negro organization submitted to each of the 46 dropouts questionnaires which revealed that all 46 wanted a high school education and wanted to return to Combs

In order to reach its conclusion that the Constitution absolutely compels quantitative integration, it was necessary for the Fifth Circuit to expressly overrule previous decisions which until then had consistently interpreted **Brown** as meaning that, "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."[24] The court recognized that in doing so it was departing from its previous concept of the controlling constitutional standards: "Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we **now** recognize."[25] The importance of this departure to the decision is indicated by the fact that the opinion devotes no less than 35 pages[26] to an attack on its prior interpretation of

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High School. *Id.*, at 22, 23. This information and a copy of the petition were obtained on May 22 from the attorney for the Board of Public Instruction of Okaloosa County, Florida, Mr. Erwin Fleet of Fort Walton Beach. It is difficult to see how the "educational opportunity" of these 46 children was improved by their compelled attendance at the predominantly white school.

[24] **Boson v. Rippy,** 285 F. 2d 43, 48 (5th Cir. 1960) (Rives, C. J.). The en banc opinion lists nine of its former decisions which it overruled, and there are others to the same effect which it did not list. Similar examples of statements in the Fifth Circuit decisions are: "Nothing contained in this opinion . . . is intended to mean that voluntary segregation is unlawful; or that the same is not legally permissible." **Armstrong v. Board of Education of City of Birmingham,** 323 F. 2d 333, 339 (5th Cir. 1963) (Rives, J.); "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. . . . The interdiction is against enforced racial segregation." **Stell v. Savannah-Chatham County Board of Education,** 333 F. 2d 55, 59 (5th Cir. 1964) (Bell, J.).

[25] Rehearing opinion, p. 5.

[26] pp. 28-73; 372 F. 2d at 861-78.

Brown as similarly expressed (and still adhered to) in decisions of other jurisdictions—such as **Briggs v. Elliott**, 132 F. Supp. 776 (E. D. S. C. 1955), and **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), **cert. denied**, 377 U. S. 924 (1964). Inasmuch as the central issues and principles of the decision relate to the definition of the essential nature of the rights and duties decreed by **Brown I** rather than mere remedial details, the decision's impact and application extend beyond this circuit.

B. **The Decision Below Conflicts With the Decisions of the Other Circuits in Its Requirements of Mandatory Quantitative Integration.**

Both in its governing constitutional principles and in each of its fundamental requirements discussed above[27] the decision of the Fifth Circuit is in conflict with the decisions of every other circuit which has considered these questions.

1. **Fourth Circuit.** In **Bradley v. School Board of Richmond**, 345 F. 2d 310 (4th Cir.), vacated and remanded on other grounds, 382 U. S. 103 (1965), a majority of the Fourth Circuit sitting en banc approved without qualification a freedom-of-choice method of assignment which the court below now rejects.[28] The Negro appellants

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[27] That the Fourteenth Amendment requires "substantial integration" measured by quantitative results; that the only constitutionally adequate method of student assignment is one which achieves such "results"; that a freedom-of-choice method of assignment is inherently inadequate and must be abandoned if it has failed to achieve those results; and that freedom of choice is permissible only if superimposed on geographical zones.

[28] The Richmond plan, as described in 345 F. 2d at 315, provided "for a freedom-of-choice by every individual in the Richmond School system as to the school he attends. There also is a requirement that the choice be affirmatively exercised by every pupil entering the system for the first time and by every other pupil as he moves from one level to another." It is the same plan which petitioners unsuccessfully urged the Fifth Circuit to approve in the present cases.

urged that it be rejected for reasons similar to those on which the decision of the Fifth Circuit is based. In reply to the appellants' insistence that the plan was unconstitutional because the preferences of Negro parents for predominantly Negro schools "result[ed] in the continuance of some schools attended only by Negroes," the Fourth Circuit concluded (*Id.* at 316):

> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint [in **Brown**] of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

To their contention that a freedom of choice plan is adequate only if it is combined with geographic assignments based on residence, as provided in Section II (d) of the Fifth Circuit's decree, the Fourth Circuit concluded (*Id.*, at 318-19):

> We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfer is an acceptable device for achieving a legal desegregation

> of schools. Its acceptability is not dependent upon the concurrent use of some other device which also might be adequate. . . . Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means [in addition to geographic zoning] of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

For its holding, the Fourth Circuit relied explicitly on **Briggs v. Elliott**, 132 F. Supp. 776 (E. D. S. C. 1955), which the Fifth Circuit concluded to be inconsistent with the constitutional requirements imposed by **Brown**. The completely opposite results were reached by the Fourth and Fifth Circuits in factual circumstances that were identical insofar as they are material to the decision. The basis of the Fifth Circuit's decision that there is a constitutional duty throughout the Fifth Circuit to achieve "substantial integration" is that everywhere in the South (including Richmond, Virginia), due to "formerly de jure" segregation, "the separation **originally** was racially motivated and sanctioned by law."[29]

Demonstrating more clearly its direct conflict with the decision below are the Fourth Circuit's recent en banc decisions in **Bowman v. County School Board of Charles City County, Va.**, F. 2d (4th Cir., June 12, 1967), and **Green v. County School Board of New Kent County, Va.**,

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[29] See, e. g., Panel Opinion, page 77; En Banc Opinion, page 5, n. 1.

F. 2d (4th Cir., June 12, 1967), which are printed as Appendix B, *infra*. None of the school systems involved in those cases adopted any plan of desegregation until after the commencement of suits in 1965. As the result of those suits, each board adopted a freedom of choice plan identical to that approved in **Bradley**—providing only for permissive choices except when a student initially entered the system or progressed to another school level. It is evident from the opinions that the Negro appellants challenged the adequacy of the plans on the same grounds on which the Fifth Circuit's decision is based. Directly contrary to the decision below, a majority of the Fourth Circuit held:

> In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignment to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention . . .
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> If each pupil, each year, attends the school of his choice, the constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holdings.

Although the majority opinion of the Fourth Circuit considered its decision to be consistent with the requirements of the decree formulated by the Fifth Circuit in the present cases, it clearly did not purport to adopt the objective of substantial quantitative integration as a constitutional duty, and the concurring opinion of Judges Sobeloff and Winter leaves no doubt that the Fourth Circuit's decision conflicts with the decision below in every major constitu-

tional point which petitioners now raise regarding pupil assignment. Most notably, it is pointed out that the Fourth Circuit's decision does not require mandatory annual choices with provision for compulsive assignments "to the school nearest his home" in event of a student's failure to exercise a choice, that it does not contemplate that the sufficiency of a free choice plan be measured by consideration of quantitative results, and that it does not require that freedom of choice be replaced if it does not result in actual integration. The concurring opinion also points out that the Fourth Circuit continues to follow and apply the principles in **Briggs v. Elliott**, in determining the constitutional adequacy of desegregation plans. In short, there is absolutely no way the Fourth Circuit's decisions can be squared with that of the Fifth.

2. **Eighth Circuit.** The Eighth Circuit recently has expressly rejected each of the major premises which the Fifth Circuit sustained. **Clark v. Board of Education of Little Rock School Dist.**, 369 F. 2d 661 (4th Cir. 1966), rehearing denied 374 F. 2d 569 (8th Cir. 1967). The assignment features of the plan approved by the Eighth Circuit in **Clark** were the same as those in the Fourth Circuit decisions: an unrestricted freedom-of-choice plan with no provision for geographic assignments on failure to make a choice. The court rejected the contention that the constitutionality of a plan depends upon whether it "works" in achieving numerical results (369 F. 2d at 666):

> Thus, they [plaintiffs] argue that the "freedom of choice" plan is not succeeding in the integration of the schools.
>
> Though the board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional ob-

jections simply because large segments of whites and Negroes choose to continue attending their familiar schools.

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In short, the constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

Regarding the validity in general of a freedom-of-choice plan of the sort which petitioners urged the Fifth Circuit to allow, the Eighth Circuit concluded:

> Notwithstanding the H. E. W. Guidelines and the recent opinion of the Fifth Circuit [in **Jefferson County**], when a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. We find no state act that results in discrimination against Negroes [374 F. 2d at 571].
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> Therefore, if in fact all the students wishing to transfer were fully accommodated, the constitution would unquestionably be satisfied . . . [374 F. 2d at 572].
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> If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to the classrooms. We find no unlawful discrimination in the giving of students a free choice of schools [369 F. 2d at 666].

With respect to the contention that a free choice plan must provide for a mandatory annual choice with geographic assignments on failure to choose, the Eighth Circuit stated:

> They are afforded an annual right to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student [369 F. 2d at 668].
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> * * * * * * *
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> On its face, we believe that the plan, as approved by us, is proper and constitutional, and appellants have made no showing that this non-mandatory freedom of choice plan to laterally transfer schools has infringed their constitutional rights [374 F. 2d at 571].

It is true that in rejecting the Fifth Circuit's present decision, the Eighth Circuit commented that the "factual situation" was different in that the Fifth Circuit was "still dealing with dual attendance zones" and that "a much greater degree" of integration has been achieved in Arkansas than the states "directly concerned" in the Jefferson County decision. However, the Fifth Circuit's decision was based upon much broader grounds than any factual differences between Arkansas and the six states comprising the Fifth Circuit—namely, that racial concentrations in Southern schools (including those in Arkansas) were originally caused by legally enforced dual school systems, and that Southern schools therefore have an affirmative duty to do whatever is necessary to eliminate the disproportionate concentrations which are deemed to be vestiges of the dual system. The Fifth Circuit's decision was not based on any notion that the petitioner Boards continue now to have "de jure" segregation, but

on the theory that all "cases in this circuit involve **formerly** de jure segregated schools" (*E. g.*, Panel Opinion, p. 39). The Fifth Circuit's decision was not based on and did not involve dual attendance **zones**, which admittedly are eliminated by freedom of choice plans, but was concerned solely with what it considered to be vestiges of the dual school **system**. Further, the degree of integration in Arkansas schools generally and in Little Rock specifically is not so "much greater" as to avoid application of the Fifth Circuit's decision. Appendix A 1 to the Report of the United States Commission on Civil Rights, **Racial Isolation in Public Schools** (1967), lists the following as the percentages of total Negro elementary students attending schools with 90 to 100 per cent Negroes in sample Arkansas cities: Little Rock, 95.6%; Forrest City, 98.3%; Helena, 99.5%; Jonesboro, 98.6%; Marvell, 98.1%; Pine Bluff, 98.2%; Hot Springs, 90.6%. Quite plainly, none of the Arkansas schools approach achievement of the "substantial-integration" (15% to 18% after two years) required by the Fifth Circuit's decision. Moreover, the Fifth Circuit's decision is made expressly applicable to every school system in this Circuit, including states and communities in which the degree of percentage integration is equivalent to or quite substantially larger than that in Arkansas.[30]

3. **Sixth Circuit.** The petitioners in **Deal v. Cincinnati Board of Education**, No. 1358, October Term, 1966, assert in their petition for certiorari that the Sixth Circuit's decision in **Deal v. Cincinnati Board of Ed.**, 369 F. 2d 55 (6th Cir. 1966), is in conflict with the Fifth Circuit's decision below. We agree. The **Deal** decision rests on that circuit's interpretation of **Brown** as holding that the very

[30] For example, the 1966-67 statistical summary compiled by the Southern Education Reporting Service shows for the 1966-67 school year that the percentage of Negro enrollment in schools with whites was 44.9% in Texas, 22.3% in Florida.

right which is accorded constitutional protection is the individual student's freedom of choice, and that the Fourteenth Amendment operates only to prohibit "enforced segregation" impinging on that freedom of choice.[31] The decision of the Fifth Circuit, to the contrary, is based on the totally inconsistent interpretation of **Brown** resulting in its conclusion that "freedom of choice is not a goal in itself" and that "a school child has no alienable right to choose his school," and indeed that in order to effectuate a goal of "substantial-integration" the Constitution affirmatively requires restriction on freedom of choice for the individual by compelling his assignment to other schools. See also **Kelley v. Board of Education of City of Nashville**, 270 F. 2d 209 (6th Cir. 1959), where the Sixth Circuit applied the same principles in the context of a desegregation plan adopted by a school system which previously had a "de jure" segregated system.

4. **Other Circuits.** A number of other circuits have held uniformly that neither the Fourteenth Amendment nor this Court's decisions require school systems to eliminate or relieve racial concentrations or imbalances in certain schools not shown to result from purposeful and enforced

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[31] The Sixth Circuit thus concluded in **Deal**:

"The principle thus established in our law [by **Brown** and subsequent decisions] is that the State may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. **Since it is freedom of choice that is to be protected,** it is not necessary that any particular harm be established if it is shown that the range of individual options had been constricted without the high degree of justification which the Constitution requires."

* * * * * * * *

"The element of inequality in **Brown** was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race.

* * * * * * * *

"We read **Brown** as prohibiting only enforced segregation" [369 F. 2d at 59, 60].

segregation by the school boards. **Springfield School Committee v. Barksdale**, 348 F. 2d 261, 264 (1st Cir. 1965); **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), **cert. denied**, 377 U. S. 924 (1964); **Downs v. Board of Education of Kansas City**, 336 F. 2d 988 (10th Cir. 1964), **cert. denied**, 380 U. S. 914 (1965). That several of these cases involved school systems operated on a neighborhood school basis rather than freedom of choice does not lessen the conflict in controlling constitutional principle or indeed in fact. To conveniently distinguish them with the facile label of "de facto" segregation is not only overly simplistic but avoids the fundamental principles of constitutional interpretation on which the Fifth Circuit's decision is based. The Fifth Circuit's decision is not based on any finding that the petitioners or other school systems in this circuit continue now to operate "de jure" segregated schools or that they now engage in purposeful segregation or discrimination. And it could not have been, since unrestricted free choice plainly is not legally enforced segregation. Rather, it held that a duty to achieve "substantial-integration" to eliminate "disproportionate racial concentrations" extended to them because of their "formerly de jure" segregation.[32] Its constitutional theory is that despite freedom of choice, the existence of schools with racial imbalances can be traced to past practices of segregation. The court below accordingly recognized the similarity between what is termed "pseudo de facto segregation in the South," in the form of continued isolation caused by the students' choices, and what it called "actual de facto segregation in the North."[33] Yet, the similar degree of racial imbalance in northern schools can be traced to the same or similar causes. Indeed, the Civil Rights Commission observes in its most recent report:[33a]

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[32] Panel Opinion, pp. 14, 39.

[33] Panel Opinion, p. 68.

[33a] **Racial Isolation in the Public Schools**, p. 42 (1967).

"These cases [involving Northern schools] appear to be the legacy of an era, recently ended in some places in the North, when laws and policies explicitly authorized segregation by race. State statutes authorizing separate-but-equal public schools were on the books in Indiana until 1949, in New Mexico and Wyoming until 1954, and in New York until 1938. Other Northern states authorized such segregation after the Civil War and did not repeal their authorizing statutes until early in the 20th century."

The Civil Rights Commission report goes on to cite examples in a number of states and cities, including Cincinnati, Ohio, Illinois, Kansas, New Jersey and other places where segregated schools were operated by law or custom, some as recently as 1952 and 1954—the very places involved in the **Deal, Bell, Downs,** and other cases cited above. As the dissenting opinion of Judge Gewin in the present cases points out, the principles on which the decision below is based apply equally to the circumstances in **Bell v. School City of Gary,** supra, since, as the district court there observed (213 F. Supp. at 822), Gary, Indiana, had operated a segregated dual system until 1949. The only real distinction between those cases and this one is that involved school systems which assigned students to neighborhood schools, whereas here the students have freedom of choice. However, it has been observed that the relatively recent creation of neighborhood schools in the North was racially motivated from the outset. As stated by Dr. Max Wolff, Senior Research Sociologist for the New York Center for Urban Education:[34]

"The neighborhood school concept arose in the twenties of this century, responding to the widespread migration of Negroes to the North after World War I."

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[34] Dr. Max Wolff, "The Educational Park," Conference on Education and Racial Imbalance in the City, page 4 (March, 1967).

There simply is no distinction in constitutional principle between the segregation existing in the North and that in the Fifth, Fourth, and Eighth Circuits. Everywhere, North and South, school segregation is the result of a complex variety of socio-economic causes and conditions including, both North and South, past official policy and practices of school segregation.[35] Certainly to a greater degree than free choice methods of assignment in the South, strictly administered neighborhood school policies in the North involve official participation by school officials in the creation and perpetuation of schools with "disproportionate racial concentrations."[36] The Fifth Circuit's decision now holds that there is a constitutional duty applicable to all school systems in the South to eliminate racial imbalance resulting from choices made by students. Meanwhile, Northern cities with equally disproportionate racial concentrations in their schools[37] and with substantially equivalent or greater disparities in physical facilities and pupil-teacher ratios as in the South[38] remain untouched by any duty under the Fourteenth Amendment to achieve the quantitative integration

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[35] United States Commission on Civil Rights, Racial Isolation in the Public Schools, pages 200-02.

[36] The Civil Rights Commission thus concludes that, "geographical zoning, the most commonly used form of student assignment in Northern cities, has contributed to the creation and maintenance of racially and socially homogenous schools." *Id.*, at 202.

[37] See Appendix A. 1, Report of U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967).

[38] See Southern Education Report, page 4 (May, 1967), setting forth a comparison of the physical characteristics of schools attended by Negro and white students in the whole nation and in the South, compiled from Table 2, page 11, of the U. S. Office of Education Report, **Equality of Educational Opportunity** (1966). It is revealed there, for example, that whereas the average pupils per room in the whole nation is 34 for Negro students and 31 for white, in the metropolitan South it is only 30 for Negro students and 34 for white.

which the Fifth Circuit now requires of the South. We do not believe the Constitution is capable of such sectionalization. If there exists any constitutional duty to achieve "substantial integration", there is no basis in fact or principle why the same duty does not govern Northern school systems with segregated schools resulting from substantially the same causes and having substantially the same characteristics as those in the South. We submit, therefore, that the decision of the Fifth Circuit is in conflict in both principle and fact with the decisions of other circuits involving so-called "de facto" segregation. The conflict is compounded by the fact that all of these decisions of other circuits expressly rely on the constitutional principles in the prior decision of the Fifth Circuit which are now expressly overruled by the decision below.

The Tenth Circuit's recent decision in **Board of Education of the Oklahoma City Public Schools v. Dowell,** F. 2d (8th Cir., January 23, 1967), **cert. denied,** 35 U. S. L. Week 3418 (U. S. May 29, 1967), does not remove or lessen this conflict. **Dowell** involved a strictly enforced geographic zoning method of assignment, not freedom of choice. The district court's order did not require or contemplate the achievement of "substantial integration" and did not compel any student to attend a school for the purpose of achieving integration. Indeed, the major innovation by the district court was a form of free choice —"majority to minority" transfer provision which merely **permitted** students to choose a school outside of their zone. The district court's order was based upon an expressed finding of bad faith and a detailed evidentiary study of the propriety of the plan it adopted to the peculiar circumstances of the Oklahoma City system; it was not based on the broad concept of a constitutional duty applying uniformly to all school systems in the circuit regardless of good faith and local circumstances, as was

the decision of the Fifth Circuit. The Tenth Circuit's affirmance was predicated expressly on the district court's finding of bad faith, and it was on this ground that it distinguished its former decision in **Downs**. The Tenth Circuit's decision in **Dowell** was very narrow and did not purport to establish any new concept of constitutionnal law consistent with that adopted in the present cases by the Fifth Circuit. On the contrary, it expressly re-affirmed its decision in **Downs**, where it had said:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend schools with them.

C. In Holding That There Is an Absolute Duty to Achieve Substantial Quantitative Integration, the Decision Below Is Erroneous and Conflicts With Decisions of This Court.

The Fifth Circuit's decision seems to be bottomed on an interpretation of this Court's decisions as establishing a "governmental objective of . . . educational opportunities on equal terms to all"[38] which imposes upon the students and schools alike a duty to benefit Negroes as a class[39] even if it requires the subordination of the rights

[38] En banc Opinion, page 6.

[39] E. g., Panel Opinion, pages 47, 50, 51.

and preferences of individual Negro students to the assumed right of the class. Insofar as the decision looks toward the attainment of equal educational opportunities and requires to this end that the dual system be eliminated through elimination of racial distinctions in faculty assignments, activities, and facilities, petitioners have no fundamental quarrel. Insofar as this objective is considered to embrace a duty on children and schools to achieve "substantial-integration", however, petitioners believe the Fifth Circuit has misconstrued the fundamental substance of this Court's decisions.

First, it would seem quite basic that this Court in **Brown I** was concerned with and determined only the **rights** of individuals, as distinguished from any **obligations** of individual Negro students to either their class or to public education generally. Of course it is true that, as the decision below stresses at considerable length, **Brown** was a class action, but the clear intent of **Brown** was to confer the same personal right to all members of the class to the attendance of a school without regard to race—not that the class as a distinct corporate body itself has any right which transcends and subordinates the individual rights of its members. Subsequent decisions of this Court have expressed the personal nature of the right thus conferred upon individual Negroes as members of the class. In **Brown II**, 349 U. S. 294, 300 (1955), it was observed that, "at stake is the **personal** interest of plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis." In **Cooper v. Aaron**, 358 U. S. 1, 19 (1958), the Court similarly spoke of "the right of a student not to be segregated." No subsequent decision has ever intimated that the individual right is in any way limited by a theoretical right of the class. Underscoring the individuality of the bases of its decision is the important finding in **Brown I** that separation of children "solely because of their race generates

a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U. S. at 494. But it did not decide "that there must be coerced integration of the races in order to accomplish an educational equality, for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."[40] A requirement of "substantial-integration" by which the constitutionality of a desegregation plan is measured by the quantitative results necessarily has the effect of transforming the rights of the individual students as decreed by **Brown I** into an obligation to be assigned to a particular school in order to accomplish educational benefits for the class.

Secondly, an unrestricted freedom of choice plan, if fairly and properly administered, constitutes "a system of determining admission to the public schools on a nonracial basis," which **Brown II** defined as the ultimate object of the remedies to be fashioned for pupil assignment. 349 U. S. at 300-01.[41] It also effectively eliminates any constitutional objection, as expressed in **Rogers v. Paul**, 382 U. S. 198, 199 (1965), based on the fact that students might have been previously "assigned to a Negro . . . school on the basis of their race." For under a freedom of choice plan, their assignments are based solely on their personal choice. Thus, the 3,348 Negro students in the Bessemer system who have made choices for the 1967-68 school year will be attending certain schools not because of "constitutionally forbidden" assign-

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[40] **Olson v. Board of Education of Malverne, N. Y.**, 250 F. Supp. 1000, 1006 (E. D. N. Y. 1966).

[41] Of course, we do not mean to contend that there might not be other aspects of school operations, apart from the manner of student assignment, for which other requirements might be imposed in order to comply fully with **Brown II**. We are speaking here solely of freedom of choice as a constitutionally adequate method of student assignment.

ments based on race but because of their affirmative choices. It likewise effectuates the elimination of "dual school systems," since the school boards no longer maintain a dual system based on race but a system of schools attended by the children who select them. If the choices made by the students result in "disproportionate concentrations of Negroes in certain schools,"[42] there may be a racial imbalance but on its face it is not an imbalance caused by school officials. In requiring that a freedom of choice method of assignment must be abandoned as constitutionally inadequate solely because it does not achieve certain preconceived results, the Fifth Circuit has imposed a duty wholly different from and far exceeding anything contemplated by the decisions of this Court. There is not the slightest intimation in any decision of this court that a freedom of choice method of student assignment is not constitutionally adequate. On the contrary, however, in the few instances in which the Court has had occasion to consider or discuss the adequacy of free choice plans, it has conveyed a distinct impression that they constitute sufficient means of desegregation regardless of the numerical results of their operation—an impression which has been a basis for the consistent approval of similar plans by circuits other than the Fifth Circuit.[43] See **Goss v. Board of Education of City of Knoxville**, 373 U. S. 683, 687, 689 (1963); **Calhoun v. Latimer**, 377 U. S. 263 (1964); **cf. Shuttlesworth v. Birmingham Bd. of Ed.**, 358 U. S. 101 (1958); **Bradley v. School City of Richmond**, 382 U. S. 103 (1965).

Moreover, although the decision below requires the adoption of another means of assignment, there was no

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[42] Panel Opinion, p. 6.

[43] See, *e. g.*, **Bradley v. School Board of City of Richmond**, 345 F. 2d 310, 318 (4th Cir. 1965), vacated and remanded on other grounds, 382 U. S. 103 (1965).

evidence before the court that any other method, such as geographic zoning, would be as effective. Due to residential racial isolation, it is likely that in the South as now in the North a geographic approach will tend only to accentuate racial concentrations in the schools.[44] Indeed, the Civil Rights Commission does not find freedom of choice to be improper if it is properly administered.[45]

Finally, in the context of an unrestricted free-choice plan, the percentage results of themselves evidence neither the state action nor the discrimination necessary to the assertion by the court below of authority under the Fourteenth Amendment to compel a change in the method of assignment. Unless it be shown that the choices made by the students are influenced in some way by school officials or that they do not reflect the students' actual preferences, any resulting racial imbalance is due to the students' actions. In its conclusion that percentage results constitute a sufficient basis for determining the constitutional inadequacy of a plan, the Fifth Circuit followed the jury exclusion cases in which it has been held that disproportions constitute presumptive evidence of purposeful discrimination.[46] But that rule of evidence is manifestly inapplicable in the context of a free-choice plan since, as in the case of peremptory jury challenges, the selection process is not "wholly in the hands of state officers." **Swain v. Alabama**, 380 U. S. 202, 226-28 (1965). On the contrary, the selection process is wholly in the hands of the **children**. Yet, there was absolutely no evi-

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[44] As observed in Rep. U. S. Comm. on Civil Rights, **Racial Isolation in the Public Schools**, p. 60 (1967), "since residential segregation generally is as intense in Southern and border cities as in Northern cities, the racial composition of Southern and border city schools substantially reflects the pattern of residential segregation."

[45] *Id.*, at 66-70.

[46] Panel Opinion, pp. 95-96.

dence in these cases, and the court referred to nothing outside the record, which indicates in the slightest that the students' choices were influenced by any consideration other than personal preference.

II.

The Civil Rights Act of 1964 Does Not Provide Authority for the Decision.

Although the decision discusses previous decisions of this Court and draws alternately on the Fourteenth Amendment and on the "1966 Guidelines" of the Department of Health, Education and Welfare,[47] it is evident that all of the major substantive requirements imposed by the decision and decree are based directly and solely on the H. E. W. Guidelines.[48] The decision of the panel thus commences with the suggestion that the Civil Rights Act of 1964 establishes new and different constitutional standards for school desegregation.[49] It never mentions, however, where in the Civil Rights Act or its legislative

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[47] The 1966 "Guidelines" are printed as Exhibit I to the Petition in **Caddo Parish School Board v. United States.**

[48] For example, both the percentage requirements (see p. 95; 372 F. 2d at 887) and all of the essential provisions of the uniform decree (see p. 112, 372 F. 2d at 894) are drawn specifically from the Guidelines. Although the opinion states that the "substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by the decisions of the Supreme Court and of this Court" and that the decision looks to the Guidelines only "[f] or administrative details," the fundamental requirements of the Guidelines to which petitioners object are clearly of constitutional dimension, rather than matters of mere administrative detail. It is equally clear that for such substantive requirements—and we speak here of the fundamental requirements of mandatory quantitative integration and of a uniform detailed decree—there is no precedent in any decision of either this Court or prior decisions of the 5th and other circuits.

[49] See generally pgs. 12-16; 372 F. 2d at 849-52.

history any such new constitutional standards are established, or indeed the nature of the new standards which it is considered to establish. It simply concludes that the 1966 Guidelines express these new standards and then holds that the Guidelines are constitutional and within the congressional intent of the Civil Rights Act. How this conclusion is reached is never demonstrated. It is based on the Court's view of Title VI as the part of the Act primarily intended to achieve school desegregation—not Title IV which is the only part of the Act which deals specifically with school desegregation.[50] The legislative history to the Act repudiates any notion that Title VI was intended to be the main vehicle for school desegregation.[51]

Moreover, Title IV, which dealt specifically with schools, provided in two separate places that the Act was not intended to provide means for the relief or elimination of racial imbalance. (See Sections 401 (b) and 407 (a) (2).) As recognized in the opinion below, the legislative history demonstrates that these provisions regarding racial imbalance were expressly intended by Congress to incorporate the constitutional principles and rationale of **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), which held, relying on **Briggs v. Elliot**, supra, that the constitution does not require affirmative mixing.[52] Inasmuch as the decision below requires the elimination of racial imbalance, to avoid this clear intent the decision

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[50] See Opinion, p. 19.

[51] See E. g., 110 Cong. Rec. 6840 (April 7, 1964); 110 Cong. Rec. 12690 (June 9, 1964); 110 Cong Rec. 6847; 110 Cong. Rec. 8703 (April 24, 1964).

[52] 110 Cong. Rec. 12294-95 (Sen. Humphrey, June 4, 1964). Senator Humphrey thus summarized the intent of the provisions:

"The bill does not attempt to integrate the schools but it does attempt to eliminate segregation." Id.

below states that Congress' use of the term "racial imbalance" and its adoption of **Bell v. School City of Gary**, supra, were intended to apply only to Northern schools. Yet, leading Senate proponents of the bill stated specifically that the proviso to Section 407 (a) (2) was intended to apply equally to all parts of the country.[53]

The virtual adoption by the decision below of the constitutional standards applied by the Department of Health, Education and Welfare not only raises serious questions regarding the proper relationship between the Federal Judiciary and administrative agencies in formulating constitutional standards, but it also creates a conflict with decisions of other circuits. A majority of the Fourth Circuit did not adopt the "guidelines" in its most recent decisions (See Appendix B, *infra*), and the Eighth Circuit has refused to follow the "constitutional requirements" of the guidelines in **Clark v. Board of Education of Little Rock**, 374 F. 2d 569 (8th Cir. 1967).[54]

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[53] See E. g., 110 Cong. Rec. 13345 (June 15, 1964), where Sen. Saltonstall stated that, "This provision would certainly apply to all parts of the country."

[54] Although the Eighth Circuit has said it gives weight to the "guidelines", it specifically does not follow their requirements which are of constitutional dimension. It thus observes (374 F. 2d at 571):

> "If a court's view of constitutional requirements results in federal funds being channeled to where the legislative branch feels they are unwarranted, this is a defect that must be cured by the administrative and legislative branches of our Government. That problem should not be met by the Court's altering its standards of constitutional protections so that these protections might correspond to the present policy of an administrative agency. If we accept this 'easy' remedy to the proper allocation of federal funds, we would be accepting the position that the flow of federal money is the final arbiter of constitutionally protected rights."

III.

The Requirement by the Decision Below of a Uniform Detailed Decree Conflicts With the Decision of This Court and Other Circuits.

This court in **Brown II**, 349 U. S. 294 (1955), determined that it should remand the cases to the trial courts for remedial implementation rather than "formulate detailed decrees" itself. 349 U. S. at 299 n. 2. The reasons for its determination were because of the district courts' "proximity to local courts", the necessity of "solution of varied local school problems" and the desirability for a "practical flexibility in shaping its remedies . . . and a facility for adjusting and reconciling public and private needs." Id. at 299-300. Since that time this court and every other federal appellate court has adhered to this determination in every school desegregation case. In its most recent decisions, in **Rogers v. Paul**, 382 U. S. 198 (1965), and **Bradley v. School Board of City of Richmond**, 382 U. S. 103 (1965), the cases were remanded to the district courts for evidentiary hearings regarding the necessity and propriety of provisions for teacher desegregation.

The decision below adopts in its uniform detailed decree substantially the provisions of H. E. W. Guidelines issued after these appeals were taken. In doing so, the basic purposes of this court's remands in **Brown II** and other instances were ignored. None of the petitioners were afforded any opportunity of a evidentiary inquiry as to the effect and propriety of these minutely restrictive provisions on the operation of their school systems. As a result, it is impossible to anticipate what effect its provisions will have on the educational functions and perogatives of local schools which are wholly unrelated to race or segregation. Only educators and school administrators are in a position to assess the effects; neither the attor-

neys for the school boards, nor the members of the court below have the necessary knowledge or training.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Constitutional and Statutory Provisions Involved.

Section 1, of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1964:

> Section 401. As used in this title—
>
> (a) "Commissioner" means the Commissioner of Education.
>
> (b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.
>
> (c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

Section 407. (a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial

balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

Section 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance

or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or order of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

APPENDIX B.

United States Court of Appeals
for the Fourth Circuit.

(No. 10,792.)

Charles C. Green, Carroll A. Green and Robert C. Green, infants, by Calvin C. Green and Mary O. Green, their father and mother and next friends, and all others of the plaintiffs,
Appellants,

versus

County School Board of New Kent County, Virginia, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.

John D. Butzner, Jr., District Judge.

(Argued January 9, 1967. Decided June 12, 1967.)

Before Haynsworth, Chief Judge, and Sobeloff, Boreman, Bryan, J. Spencer Bell, Winter and Craven, Circuit Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas, Jr., Jack Greenberg and James M. Nabrit, III, on brief) for Appellants, and Frederick T. Gray (Williams, Mullen and Christian on brief) for Appellees.

Per Curiam:

The questions presented in this case are substantially the same as those we have considered and decided today in Bowman v. County School Bd. of Charles City County.[1] For the reasons stated there, the rulings of the District Court merit our substantial approval, but the case is necessarily remanded for further proceedings in accordance with the District Court's order and our opinion in Bowman.

Remanded.

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[1] 4 Cir., ... F. 2d ... (Decided this day). The special concurring opinion of Judge Sobeloff, in which Judge Winter joins, in Bowman is applicable to this case also.

Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

APPENDIX C.

United States Court of Appeals
For the Fourth Circuit.

No. 10,793.

Shirlette L. Bowman, Rhoda M. Bowman, Mildred A. Bowman, Richard M. Bowman and Sandra L. Bowman, Infants, by Richard M. Bowman, Their Father and Next Friend, and All Others of the Plaintiffs,
Appellants,
versus
County School Board of Charles City County, Virginia et al.,
Appellees.

Appeal From the United States District Court for the Eastern District of Virginia, at Richmond. John D. Butzner, Jr., District Judge.

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S. W. Tucker (Henry L. Marsh, III, Willard H. Douglas, Jr., Jack Greenberg and James M. Nabrit, III, on brief) for Appellants, and Frederick T. Gray (Williams, Mullen & Christian on brief) for Appellees.

Haynsworth, Chief Judge:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

I.

"Freedom of choice" is a phrase of many connotations.

Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible. Long since, this court has condemned it.[1] The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. If each pupil, each year,

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[1] Nesbit v. Statesville City Bd. of Educ., 4 Cir., 345 F. 2d 333, 334 n. 3; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F. 2d 310, 319 and n. 18; Wheeler v. Durham City Bd. of Educ., 4 Cir., 309 F. 2d 630, 633; Jeffers v. Whitley, 4 Cir., 309 F. 2d 621; Marsh v. County School Bd. of Roanoke County, 4 Cir., 305 F. 2d 94; Green v. School Bd. of City of Roanoke, 4 Cir., 304 F. 2d 118; Hill v. School Bd. of City of Norfolk, 4 Cir., 282 F. 2d 473; Jones v. School Bd. of City of Alexandria, 4 Cir., 278 F. 2d 72.

attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held,[2] and we adhere to our holdings.

Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

A panel of the Fifth Circuit[3] recently had occasion to concentrate its guns upon the sort of "freedom of choice" plan we have not tolerated, but, significantly, the decree it prescribed for its district courts requires the kind of "freedom of choice" plan we have held requisite and embodies standards no more exacting than those we have imposed and sanctioned.

The fact that the Department of Health, Education and Welfare has approved the School Board's plan is not determinative. The actions of that department, as its guidelines, are entitled to respectful consideration, for, in large measure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion inde-

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[2] Wheeler v. Durham City Bd. of Educ., 4 Cir., 346 F. 2d 768, 773; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F. 2d 310, 313, vacated and remanded on other grounds, 382 U. S. 103. See Jeffers v. Whitley, 4 Cir., 309 F. 2d 621.

[3] United States v. Jefferson County Board of Education, 5 Cir., 372 F. 2d 836, aff'd on rehearing en banc, ... F. 2d ...; see also, Deal v. Cincinnati Board of Education, 6 Cir., 369 F. 2d 55.

pendently, for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.

II.

Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.[4]

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[4] The School Board of Charles City County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties.

2. Institutions, agencies, organizations, and individuals that refer teacher applicants to the school system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.

3. The School Board will take affirmative steps including personal conferences with members of the present faculty

These the District Court found acceptable under our decision in Wheeler v. Durham City Board of Education, 363 F. 2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the "Indian school" and one Negro teacher had been assigned to a formerly all white school.

The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

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to allow and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.

5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.

6. All members of the supervisory staff have been and will continue to be assigned to cover schools, grades, teachers and pupils without regard to race, color or national origin.

7. It is recognized that it is more desirous, where possible, to have more than one teacher of the minority race (white or Negro) on a desegregated faculty.

8. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.

9. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.

10. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.

11. The School Board and superintendent will exercise their best efforts, individually and collectively, to explain this program to school patrons and other citizens of Charles City County and to solicit their support of it.

On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred,[5] but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

Quite recently, a panel of the Fifth Circuit Court of Appeals[6] has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accom-

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[5] Bradley v. School Bd. of Educ. of City of Richmond, 382 U. S. 103; Wheeler v. Durham City Bd. of Educ., 4 Cir., 363 F. 2d 738.

[6] United States v. Jefferson County Bd. of Educ., fn. 3, *supra*.

Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

plish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical, administrative and other problems, if any, remaining to be solved and overcome.

Remanded.

Sobeloff, Circuit Judge, with whom Winter, Circuit Judge, Johns, concurring specially.

Willingly, I join in the remand of the cases* to the District Court, for I concur in what this court orders. I disagree, however, with the limited scope of the remand, for I think that the District Court should be directed not only to incorporate an objective time table in the School Boards' plans for faculty desegregation, but also to set up procedures for periodically evaluating the effectiveness of the Boards' "freedom of choice" plans in the elimination of other features of a segregated school system.

With all respect, I think that the opinion of the court is regrettably deficient in failing to spell out specific directions for the guidance of the District Court. The danger from an unspecific remand is that it may result in another round of unsatisfactory plans that will require yet another appeal and involve further loss of

* This special occurrence is directed not only to Bowman v. County School Bd. of Charles City County, but also Green v. County School Bd. of New Kent County, ... F. 2d ..., decided this day.

time. The bland discussion in the majority opinion must necessarily be pitched differently if the facts are squarely faced. As it is, the opinion omits almost entirely a factual recital. For an understanding of the stark inadequacy of the plans promulgated by the school authorities, it is necessary to explore the facts of the two cases.

New Kent County. Approximately 1,290 children attend the public schools of New Kent County. The system operated by the School Board consists of only two schools—the New Kent School, attended by all of the county's white pupils, and the Watkins School, attended by all of the county's Negro pupils.

There is no residential segregation and both races are diffused generally throughout the county. Yet eleven buses traverse the **entire** county to pick up the Negro students and carry them to the Watkins School, located in the western half of the county, and ten other buses traverse the **entire** county to pick up the white students for New Kent School, located in the eastern half of the county. One additional bus takes the counties' 18 Indian children to the "Indian" school, located in an adjoining county. Each of the counties' two schools has 26 teachers and they offer identical programs of instruction.

Repeated petitions from Negro parents, requesting the adoption of a plan to eliminate racial discrimination, were totally ignored. Not until some months after the present action had been instituted on March 15, 1965, did the School Board adopt its "freedom of choice" plan.[1]

The above data relate to the 1964-1965 school year.[2] Since the Board's "freedom of choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11, and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plans operation over that time span, not only as to faculty but as to

pupil integration as well. While the court does not order an inquiry in the District Court as to pupil integration, it of course does not forbid it. Since the District Judge retained the case on the docket, the matter will be open on remand to a thorough appraisal.

Charles City County. Approximately 1,800 children attend public schools in Charles City County. As in New Kent County, Negroes and whites live in the same neighborhoods and, similarly, segregated buses (Negro, Indian and white) traverse many of the same routes to pick up their respective charges.[3] The Board operates four schools in all—Ruthville, a combined elementary and high school exclusively for Negroes; Barnetts, a Negro elementary school; Charles City, a combined elementary and high school for whites; and Samaria, a combined elementary and high school for Indian children. Thus, as plaintiffs point out, the Board, well into the second decade after the 1954 **Brown** decision, still maintains "what is in effect three distinct school systems—each organized along racial lines—with hardly enough pupils for one system!"[4] The District Court found that "the Negro elementary schools serve geographical areas. The other schools serve the entire county."[5] This contrasting treatment of the races plainly exposes the prevailing

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[3] The Eighth Circuit has recently held that the operation of two school buses, one for Negro children and one for white, along the same route, is impermissible. "While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school systems." Kelley v. Arkansas Public School District, 35 U. S. L. Week 2619 (8th Cir. April 12, 1967).

[4] The Board seems to go to an extreme of inefficiency and expense in order to maintain the segregated character of its schools, indulging in the luxury of three separate high school departments to serve a total of approximately 600 pupils, 437 of whom are in one school, and three separate and overlapping bus services.

[5] ... F. Supp. ..., ... (1966).

discrimination. For the 1964-65 school year, only eight Negro children were assigned to grades 4, 6, 7, 8, 9, 10 and 11 at the all-white Charles City School—an instance of the feeblest and most inconsequential tokenism.

Again, as in New Kent County, Negro parents on several occasions fruitlessly petitioned the School Board to adopt a desegregation plan. This suit was instituted on March 15, 1965 and the Board adopted the plan presently under consideration on August 6, 1965. Not until June 1966 did the Board assign a single Negro teacher to the all-white faculty at Charles City School. Apart from this faint gesture, however, the faculties of the Negro and white schools remain totally segregated.[6]

The majority opinion implies that this court has gone as far as the Fifth Circuit and that the "freedom of choice" plan which that circuit has directed its district courts to prescribe "embodies standards no more exacting than those we have imposed and sanctioned." If this court is willing to go as far as the Fifth Circuit has gone, I welcome the resolve.[7] It may be profitable, therefore, to examine closely what the Court of Appeals of that jurisdiction has recently said and done.[8] We may

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[6] Three of the Board's eight teachers in the 175 pupil "Indian" school are white, the other five are Indian.

The Board asserts that it is "earnestly" seeing white teachers for the nine existing vacancies in the Negro schools, but so far its efforts have not met with success. This is not surprising, considering that the Board has formally declared that it "does not propose to advertise vacancies in papers as this would likely cause people of both races to apply who are not qualified to teach."

[7] A recent article in the Virginia Law Review declares the Fifth Circuit to be "at once the most prolific and the most progressive court in the nation on the subject of school desegregation." Dunn, **Title VI, the Guidelines and School Desegregation in the South**, 53 Va. L. Rev. 42, 73 (1967).

[8] United States v. Jefferson County Bd. of Educ., ... F. 2d ... (5th Cir. 1966), aff'd on rehearing en banc, ... F. 2d ... (5th Cir., Mar. 29, 1967).

then see how much further our court needs to go to bring itself abreast of the Fifth Circuit.

I. Pupils.

Under the plan of both Charles City County and New Kent County, only children entering grades one or eight are required to express a choice. Freedom of choice is permitted children in all other grades, and "any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained will be assigned to the school he is now attending."

In sharp contrast, the Fifth Circuit has expressly abolished "permissive" freedom of choice and ordered mandatory annual free choice for all grades, and "any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home * * *."[9] This is all that plaintiffs have been vainly seeking in New Kent County—that students be assigned to the schools nearest their homes.

If, in our cases, those who failed to exercise a choice were to be assigned to the schools nearest their homes, as the Fifth Circuit plan provides, instead of to the schools they previously attended, as directed in the plans before us, there would be a measure of progress in overcoming discrimination. As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western

[9] United States v. Jefferson County Br. of Educ., ... F. 2d ..., ... (5th Cir., Mar. 29, 1967) (en banc). (Emphasis supplied.)

half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient.

In Charles City County, **Negro** elementary school children are geographically zoned, while **white** elementary school children are not, despite the conceded fact that the children of both races live in all sections of the county. Surely this curious arrangement is continued to prop up and preserve the dual school system proscribed by the Constitution and interdicted by the Fifth Circuit.

> "The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an **integrated, unitary** school system in which there are no Negro schools and no white schools—just schools. * * * In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the **dual school system** in this circuit requires integration of faculties, facilities, and activities, as well as students."[10]

The Fifth Circuit stresses that the **goal** is "a unitary, non-racial system" and the question is whether a free choice plan will materially further the attainment of this goal. Stating that courts must continually check the sufficiency of school boards' progress toward the goal, the Fifth Circuit decree requires school authorities to

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[10] ... F. 2d at ... (en banc). (Emphasis supplied.)

report regularly to the district courts to enable them to evaluate compliance "by measuring the performance." In fashioning its decree, that Circuit gave great weight to the percentages referred to in the HEW Guidelines,[11] declaring that they establish "minimum" standards

> "for measuring the effectiveness of freedom of choice as a useful tool. * * * If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; **they should try other tools.**"[12]

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[11] "[S]trong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. [Footnote omitted.] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court."

United States v. Jefferson County Bd. of Educ., ... F. 2d ..., ... (5th Cir., Dec. 29, 1966), **adopted en banc**, ... F. 2d ... (5th Cir., Mar. 29, 1967). *Cf.* Cypress v. Newport News Gen. Hosp., ... F. 2d ..., ... n. 15 (4th Cir., Mar. 9, 1967).

[12] F. 2d at .... (Emphasis supplied.) The HEW Guidelines provide: (1) if 8 or 9 percent of the Negro students in a school district transferred from segregated schools during the first year of the plan, the total transfers the following year must be on the order of at least **twice** that percentage; (2) if only 4 or 5 percent transferred, a "substantial" increase in the transfers will be expected the following year—bringing the total to at least **triple** the percentage of the previous year; (3) if less than 4 percent transferred the previous year, then the rate of increase in total transfers for the following year must be proportionately greater than that under (2); and (4) if no students transferred under a free choice plan, then unless a very "substantial start" is made in the following year, the

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.[13] If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

While I would prefer it if this court were more explicit in establishing requirements for periodic reporting by the school officials, I assume that the District Court will do this, rather than place the burden upon the plaintiffs to collect the essential data to show whether the free choice plan is materially furthering the achievement of "a unitary, non-racial system."[14]

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school authorities will "be required to adopt a different type of plan." HEW Reg. A., 45 C. F. R., § 181.54 (Supp. 1966).

In both New Kent County and Charles City County, at least some grades have operated under a "freedom of choice" plan for two years. In Charles City County only 0.6% of the Negro students transferred to the white school for the 1964-65 session. Under the standards subscribed to by the Fifth Circuit, therefore, a minimum of 6% of the Negro pupils in that county should have transferred to the "white" school the following year. Less than this percentage would indicate that the free choice plan was "ineffective, longer on promises than performance," and that the school officials "should try other tools"—*e. g.*, geographic zoning or pairing of grades.

In New Kent County, no Negro students transferred during the first year of the plan. Thus, unless the requisite "substantial start" was made the following year, school officials must adopt a different plan—one that will work.

[13] Judge Wisdom, in Singleton v. Jackson Munic. Separate School Dist., 355 F. 2d 865, 871 (5th Cir. 1966), referred to "freedom of choice" plans as a "haphazard basis" for the administration of schools.

[14] See Section IX of the decree issued in United States v. Jefferson County Bd. of Educ., ... F. 2d ..., ... (5th Cir. Mar. 29, 1967) (en banc) providing for detailed reports to the district courts.

A significant aspect of the Fifth Circuit's recent decree that, by implication, this court has adopted, deserves explicit recognition. The **Jefferson County** decree orders school officials, "without delay," to take appropriate measures for the protection of Negro students who exercise a choice from "harassment, intimidation, threats, hostile words or acts, and similar behavior." Counsel for the school boards assured us in oral argument that relations between the races are good in these counties, and that no incidents would occur. Nevertheless, the **fear** of incidents may well intimidate Negroes who might otherwise elect to attend a "white" school.[15] To minimize this

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[15] Various factors, some subtle and some not so subtle, operate effectively to maintain the status quo and keep Negro children in "their" schools. Some of these factors are listed in the recent report issued by the U. S. Commission on Civil Rights:

> "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

U. S. Comm'n on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965-66, at 51 (1966). In addition to the above enumeration, a report of the Office of Education has pointed out that Negro children in the high school grades refrain from choosing to transfer because of reluctance to assume additional risks close to graduation. Coleman & Campbell, Equality of Educational Opportunity (U. S.

fear, school officials must demonstrate unequivocally that protection will be provided. It is the duty of the school boards actively to oversee the process, to publicize its policy in all segments of the population and to enlist the cooperation of police and other community agencies.[16]

The plaintiffs vigorously assert that the adoption of the Board's free choice plan in Charles City County, without further action toward equalization of facilities, will not cure present gross inequities characterizing the dual school system. A glaring example is the assignment of 135 commercial students to one teacher in the Negro school in contrast to the assignment of 45 commercial students per teacher in the white school and 36 in the Indian school. In the **Jefferson County** decree, the Fifth Circuit directs its attention to such matters and explicitly orders school **officials** to take "prompt steps" to correct such inequalities. School authorities, who hold responsibility for administration, are not allowed to sit back complacently and expect unorganized pupils or parents to effect a cure for these shockingly discriminatory conditions. The decree provides:

> "Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be **distributed evenly** between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, * * * such school shall be **closed** as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice."[17]

Office of Education, 1966). See also **Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary**, 89th Cong., 2d Sess., ser. 23 (1966).

[16] HEW Reg. A, 45 C. F. R., § 181.17 (c). (Supp. 1966).

[17] ... F. 2d at ... (en banc). (Emphasis supplied.)

II. Faculty.

Defendants unabashedly argue that they cannot be compelled to take any affirmative action in reassigning teachers, despite the fact that teachers are hired to teach in the system, not in a particular school. They assert categorically that "they are not required under the Constitution to desegregate the faculty." This is in the teeth of **Bradley v. School Bd. of Richmond**, 382 U. S. 103 (1965).

Having made this declaration, they say that they have nevertheless submitted a plan which does provide for faculty desegregation, but circumspectly they add that "it will require time and patience." They protest that they have done all that could possibly be demanded of them by providing a plan which would permit "a constructive beginning." This argument lacks appeal an eighth of a century after **Brown.**[18] Children too young for the first grade at the time of that decision are beyond high school age by now. Yet their entire school experience, like that of their elder brothers and sisters, parents and grandparents, has been one of total segregation. They have attended only a "Negro" school with an all Negro staff and an all Negro student body. If their studies encompassed **Brown v. Bd. of Educ.** they must surely have concluded sadly that "the law of the land" is singularly ineffective as to them.

The plans of both counties grandly profess that the pattern of staff assignment "will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools." No specific steps are set out, however,

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[18] "The rule has become: the later the start the shorter the time allowed for transition." Lockett v. Bd. of Educ. of Muscogee County, 342 F. 2d 225, 228 (5th Cir. 1965). See Rogers v. Paul, 382 U. S. 198, 199 (1965); Bradley v. School Bd. of Richmond, 382 U. S. 103 (1965); Griffin v. County School Bd., 377 U. S. 218, 229 (1964); Watson v. City of Memphis, 373 U. S. 526, 530 (1963).

by which the boards mean to integrate faculties. It cannot escape notice that the plans provide only for assignments of "new personnel in a manner that will work towards the desegregation of faculties." As for teachers presently employed by the systems, they will be "allowed" (in Charles City County, the plan reads "allowed and encouraged") to accept transfers to schools in which the majority of the faculty members are of the opposite race. We are told that heretofore an average of only 2.6 new white teachers have been employed annually in New Kent County. Thus the plan would lead to desegregation only by slow attrition. There is no excuse for thus protracting the corrective process. School authorities may not abdicate their plain duty in this fashion. The plans filed in these cases leave it to the teachers, rather than the Board, to "disestablish dual, racially segregated school systems" and to establish "a unitary, non-racial system." This the law does not permit.

As the Fifth Circuit has put it, "school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hallmark of the dual system."[19]

> "[U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system."[20]

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[19] ... F. 2d at ....

[20] United States v. Jefferson County Bd. of Educ., ... F. 2d ..., ... (5th Cir. 1966); adopted en banc, ... F. 2d ... (5th Cir. Mar. 29, 1967).

This thought has been similarly expressed in Bradley v. School Bd. of City of Richmond, 345 F. 2d 310, 323 (4th Cir. 1965) (concurring opinion). (Emphasis in the original.)

> "It is now 1965 and high time for the court to insist that good faith compliance requires administrators of

In contrast to the frail and irresolute plans submitted by the appellees, the Fifth Circuit has ordered school officials within its jurisdiction not only to make **initial** assignments on a non-discriminatory basis, but also to **reassign** staff members "to eliminate **past** discriminatory patterns."

For this reason, I wholeheartedly endorse the majority's remand for the inclusion of an **objective** time table to facilitate evaluation of the progress of school authorities in desegregating their faculties. I also join the majority in calling upon the District Court to fashion a specific and comprehensive order requiring the boards to take firm steps to achieve **substantial** desegregation of the faculties. At this late date a desegregation plan containing only an indefinite pious statement of future good intentions does not merit judicial approval.

I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school systems to take further steps at this stage. No legally acceptable justification appears, or is even faintly intimated, for not immediately integrating the faculties. The court underestimates the clarity and force of the facts in the present record, particularly with respect to New Kent County, where there are only two schools, with identical programs of instruction, and each with a staff of 26 teachers. The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their task—no longer avoidable or deferrable—to integrate their faculties. In **Kier v. County School Bd.**

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schools to proceed actively with their nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated."

of Augusta County, 249 F. Supp. 239, 247 (W. D. Va. 1966), Judge Michie, in ordering complete desegregation by the following year of the staffs of the schools in question, required that "the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system" for the previous year. See Dowell v. School Bd., 244 F. Supp. 971, 977-78 (W. D. Okla. 1965), aff'd, 35 U. S. L. Week 2484 (10th Cir., Jan 23, 1967), cert. denied, 35 U. S. L. Week 3418 (U. S. May 29, 1967). While this may not be the precise formula appropriate for the present case, it does indicate the attitude that district courts may be expected to make if this court speaks with clarity and firmness.

III. The Briggs v. Elliott Dictum.

The defendants persist in their view that it is constitutionally permissible for parents to make a choice and assign their chlidren; that courts have no role to play where segregation is not actively enforced. They say that Brown only proscribes enforced segregation, and does not command action to undo existing consequences of earlier enforced segregation, repeating the facile formula of Briggs v. Elliott.[21]

The court's opinion recognizes that "it is the duty of the school boards to eliminate the discrimination which inheres" in a system of segregated schools where the "initial assignments are both involuntary and dictated by racial criteria," but seems to think the system under consideration today "a very different thing." I fail to perceive any basis for a distinction. Certainly the two counties with which we are here concerned, like the rest of Virginia, historically had *de jure* segregation of public

[21] "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E. D. S. C. 1955).

education, so that by the court's own definition, the boards are under a duty "to eliminate the discrimination which inheres" in such a system. Whether or not the schools now permit "freedom of choice," the segregated conditions initially created **by law** are still perpetuated by relying primarily on Negro pupils "to extricate themselves from the segregation which has long been firmly established and resolutely maintained * * *."[22] "[T]hose who operate the schools formerly segregated by law, and not those who attend, are responsible for school desegregation."[23]

It is worth recalling the circumstances that gave birth to the **Briggs v. Elliott** dictum—it is no more than dictum. A three-judge district court over which Judge Parker presided had denied relief to South Carolina Negro pupils and when this decision came before the Supreme Court as part of the group of cases reviewed in **Brown v. Bd. of Educ.**, the Court overruled the three-judge court and issued its mandate to admit the complaining pupils to public schools "on a racially non-discriminatory basis with all deliberate speed." Reassembling the three-judge

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[22] Bradley v. School Bd. of City of Richmond, 345 F. 2d 310, 322 (4th Cir. 1965) (concurring opinion).

[23] Dunn, **Title VI, the Guidelines and School Desegregation in the South**, 53 Va. L. Rev. 42, 45 (1967).

See Dowell v. School Bd., 244 F. Supp. 971, 975, 981 (W. D. Okla. 1965), **aff'd** 35 U. S. L. Week 2484 (10th Cir. Jan. 31, 1967), **cert. denied**, 35 U. S. L. Week 3418 (U. S. May 29, 1967):

> "The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and **the failure to adopt an affirmative policy is itself a policy**, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process.
>
> * * * * * * *
>
> The duty to disestablish segregation is clear in situations such as Oklahoma City, where such school segregation policies were in force and their effects have not been corrected" (Emphasis supplied.)

panel, Judge Parker undertook to put his gloss upon the Supreme Court's decision and coined the famous saying.[24] This catchy apothegm immediately became the refuge of defenders of the segregation system, and it has been quoted uncritically to eviscerate the Supreme Court's mandate.[25] ... F. 2d ..., ... (Emphasis supplied).

Having a deep respect for Judge Parker's capacity to discern the lessons of experience and his high fidelity to duty and judicial discipline, it is unnecessary for me to speculate how long he would have adhered to his view, or when he would have abandoned the dictum as unworkable and inherently contradictory.[26] In any event,

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[24] See n. 19, *supra*.

[25] Judge Wisdom, in the course of a penetrating criticism of the **Briggs** decision, says:

> "**Briggs** overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools **or a school system with uncorrected effects of segregation.**
>
> * * * * * * * *
>
> Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and **the organized undoing of the effects of past segregation.**
>
> * * * * * * * *
>
> The central vice in a formerly de jure segregated public school system is apartheid by dual zoning * * *. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate **the school from which a transferee comes** as well as the school to which he goes. * * * [T]he overriding right of Negroes as a class [is] to a **completely integrated** public education."

[26] Shortly after pronouncing his dictum in another school case, Judge Parker nevertheless recognized that children cannot enroll themselves and that the duty of enrolling them and

the dictum cannot withstand the authority of the Supreme Court or survive its exposition of the spirit of the **Brown** holding, as elaborated in **Bradley v. School Bd.**, 382 U. S. 103 (1965); **Goss v. Bd. of Educ.**, 373 U. S. 683 (1963); **Cooper v. Aaron**, 358 U. S. 1 (1958).

Anything that some courts may have said in discussing the obligation of school officials to overcome the effects of *de facto* residential segregation, caused by private acts and not imposed by law, is certainly not applicable here. Ours is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the **Briggs** dictum.

> "The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of **Briggs v. Elliott** and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harassment."[27]

We should move out from under the incubus of the **Briggs v. Elliott** dictum and take our stand beside the Fifth and the Eighth Circuits.

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operating schools in accordance with law rests upon the officials and cannot be shifted to the pupils or their parents. Carson v. Warlick, 238 F. 2d 724, 728 (1956).

[27] Dunn, **Title VI, the Guidelines and School Desegregation in the South**, 53 Va. L. Rev. 42, 72 (1967). See United States v. Jefferson County Bd. of Educ., ... F. 2d ... (5th Cir., Mar. 29, 1967) (en banc); Singleton v. Jackson Munic. Separate School Dist., 348 F. 2d 729, 730, n. 5 (5th Cir. 1965) ("[T]he second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well known dictum * * * in Briggs v. Elliott * * * should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights"); Kemp v. Beasley, 352 F. 2d 14, 21 (8th Cir. 1965) ("The dictum in Briggs has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on this subject").

Cf. Evans v. Ennis, 281 F. 2d 385, 389 (3rd Cir. 1960), cert. denied, 364 U. S. 933 (1961): "The Supreme Court has unqualifiedly declared **integration** to be their constitutional right." (Emphasis supplied.)

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 256

CADDO PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 301

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court in No. 256 (I La.R. 291, 302; III La.R. 251, 261; IV La.R. 47; V La.R. 45; VI La.R. 63[1]; Pet. 44–76) are unreported.

[1] The references are to the separately paginated volumes of the record filed here in the Louisiana cases. Volume I relates to Caddo Parish, Volumes II and III to Bossier Parish, Volume IV to Jackson Parish, Volume V to Claiborne Parish, Volume VI to the City of Monroe, and Volume VII to East Baton Rouge Parish (involved in No. 282). Volume VIII contains the proceedings in the court of appeals.

The district court opinions in No. 301 (I Ala.R. 23, 52, 70; II Ala.R. 37, 41, 64, 85; III Ala.R. 65, 67, 71[2]) are also unreported. The first (panel) opinion of the court of appeals (VIII La.R. 17.; IV Ala.R. 6) is reported at 372 F. 2d 836; the opinion on rehearing *en banc* (VIII La.R. 244; IV Ala.R. 12) is not yet reported. Both opinions are printed as Exhibit "L", appended to the petition in No. 256[3].

JURISDICTION

The judgment of the court of appeals on rehearing (VIII La.R. 328; IV Ala.R. 13) was entered on March 29, 1967. The petition for a writ of certiorari in No. 256 was filed on June 16, 1967; and that in No. 301 was filed on June 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit correctly defined petitioners' constitutional duty to disestablish the dual systems of schools based on race and permissibly formulated a circuit-wide school desegregation decree.

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[2] These references are to the separately paginated volumes of the record filed here by the Alabama petitioners. Volume I relates to Jefferson County, Volume II to the City of Bessemer and Volume III to the City of Fairfield. Volume IV contains the proceedings in the court of appeals.

[3] Following the example of the petitioners, we shall refer to the pagination of the slip opinions as reproduced in the petition in No. 256, indicating the panel opinion as "Jefferson I" and the *en banc* opinion on rehearing as "Jefferson II."

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The proceedings below. These school desegregation suits were brought in the Western District of Louisiana (No. 256) and the Northern District of Alabama (No. 301) by Negro children in 1965. The United States intervened in seven [4] of the suits pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2).[5] In each instance, the district courts found that

[4] In two of the Louisiana cases, those involving Claiborne and Jackson Parishes, the United States intervened in the court of appeals. In the Bossier Parish, Louisiana, case, and in the three Alabama cases, involving Bessemer, Fairfield and Jefferson County, the United States intervened in the district court. In the Caddo Parish, Louisiana, case, the motion of the United States for leave to intervene was denied by the district court, but that ruling was reversed by the court of appeals in the instant decision.

The United States is not a party to the City of Monroe, Louisiana, suit, which is briefed in No. 256. Nor is it a party to No. 282, *East Baton Rouge Parish School Board* v. *Davis.* While we do not address ourselves to them here, an examination of these cases reveals no reason why the same principles should not govern them also.

[5] "Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action."

the defendant school boards operated and maintained racially segregated school systems in violation of the Fourteenth Amendment as construed in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, and ordered the school boards to submit desegregation plans.

The plans approved by the district court for the four Louisiana school boards involved in No. 256 were substantially similar. They provided that "initial assignments of pupils [to grades reached by the plan] * * * shall be made purely and simply on the basis of individual choice," reserving to the board, however, the right to reject choices and assign students to "comparable" schools closer to their residence. See, *e.g.*, Pet. 47. Although each plan recited that "the method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the * * * Board" (see, *e.g.*, Pet. 48), the procedure to be followed in the making of the initial assignments was nowhere spelled out. The plans in the Alabama cases provided for the continuation of initial assignments based on race, but allowed Negro students to apply for transfer to white schools. See, *e.g.*, I Ala. R. 30. The plans in all seven cases dealt only with the assignment of students. They made no provision for the elimination of racial discrimination in any other aspect of the school system, such as faculty, facilities, services and activities, transportation, construction, and consolidation.

In April 1966, the court of appeals, upon motion by the United States, grouped these cases together

for argument and set them down for expedited consideration. Oral argument was had in May 1966, and the judgment of the court of appeals was rendered on December 29, 1966. The court of appeals (District Judge Cox dissenting) reversed the district courts and remanded the cases for entry of a specific decree which was also to be used as a circuit-wide standard for school boards choosing to desegregate through use of a "freedom of choice" student assignment plan. The school boards' petition for rehearing *en banc* was granted by the court of appeals on February 9, 1967. Further briefs were submitted and on March 10, 1967, oral argument was had before the full court. In a *per curiam* opinion dated March 29, 1967, the court of appeals (three of the twelve judges dissenting and one concurring specially) adopted the opinion of December 29, 1966, adding only what it termed "clarifying statements" and making minor changes in the decree. On April 10, 1967 the court of appeals denied the motion of the school boards to recall the mandate. On April 17, 1967, this Court denied a stay.

The decision of the court of appeals. The court, in its *en banc* decision on rehearing, stated its basic conclusion in these words (*Jefferson* II, p. 5):

> The Court holds that boards and officials administering public schools in this circuit have the affiirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools.

To achieve a unitary school system, the court held, school officials must do more than "offer Negro chil-

dren the opportunity to attend formerly all-white schools." *Ibid.* The entire system must be an integrated one, including faculties, facilities and activities. *Ibid.* Finding that uniform, circuit-wide standards were necessary in the interest of effective judicial administration in order to avoid variations between districts which have no reasonable explanation, and to prevent misunderstanding of its decision, the court attached to its opinion a decree to be entered in the cases before it and to be applied in other school desegregation cases in the Fifth Circuit upon motion by proper parties. *Jefferson* II, pp. 8–24.

The decree contains a "freedom of choice" desegregation plan—the method most public schools in the Fifth Circuit have chosen for desegregating their school systems (*Jefferson* I, p. 97)—under which school assignments are determined by the choice of students and parents. The court reaffirmed the position it had taken earlier[6] that in formulating the mechanics of the desegregation plan, it would give weight to the guidelines issued by the Commissioner of Education pursuant to Title VI of the Civil Rights Act of 1964,[7] although it did not consider itself "bound" by them.

Section I of the decree provides that all grades must be desegregated commencing with the 1967–68

[6] See, e.g., *Singleton* v. *Jackson Municipal Separate School District*, 348 F. 2d 729 (C.A. 5); *Price* v. *Denison Independent School District Board of Education*, 348 F. 2d 1010 (C.A. 5).

[7] Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964, United States Office of Education, 31 Fed. Reg. 5623.

school year. Section II sets forth the mechanics governing the exercise of a choice, stating who may exercise a choice, when it is to be exercised, how students and the public are to be notified, how priorities are to be determined when the number of choices exceeds available space in a particular school, and providing for a non-racial assignment of students who do not exercise a choice. Section III provides that students newly entering the school system are to have a free choice, and Section IV makes provisions for transfers in special cases. Section V prohibits racial discrimination in services, facilities, activites and programs of the school system, and Section VI obliges the school boards to equalize the schools traditionally maintained for Negroes. The decree also has provisions respecting school transportation (Section II), school construction (Section VII), and faculty assignments (Section VIII). Finally, provision is made for submitting reports to the district court so that the court and the parties will be able to determine how the decree is being carried out (Section IX).

ARGUMENT

I

THE COURT BELOW WAS CLEARLY CORRECT IN DEFINING THE CONSTITUTIONAL OBLIGATIONS OF PETITIONERS

We think it clear that *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, condemned not only compulsory racial assignments of public school students, but also, more generally, the maintenance of a dual public school system based on race—where one

set of schools is maintained for Negroes and the other for whites. The use of dual attendance zones based on race is only one aspect of school systems organized and structured on the principle of racial separation. That was, to be sure, an obviously discriminatory characteristic of the school systems to which *Brown* was addressed; but those segregated systems were tainted in other respects as well. The school authorities, as an integral part of furthering their policy to maintain separate schools for Negroes and whites, also allocated teachers, located new schools, determined the grades and capacity of schools, organized the school transportation system, and established interscholastic athletic leagues—to mention some examples—on the basis of racial segregation. It was this entire dual system that was condemned in *Brown*. See 349 U.S. 294, at 300–301.[8] What was envisaged was a transition from a dual system based on race to a unitary, non-racial system; a requirement obliging the boards to revise completely all aspects of the school system. See, also, *Bradley* v. *School Board*, 382 U.S. 103, 105; *Rogers* v. *Paul*, 382 U.S. 198; *Northcross*

[8] The Court there said:

"[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. * * * To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. * * *"

v. *Board of Education of City of Memphis*, 302 F. 2d 818, 823–824 (C.A. 6); *Kelley* v. *Altheimer, Arkansas Public School District No. 22*, No. 18, 528 (C.A. 8, decided April 12, 1967); cf. *Baldwin* v. *Morgan*, 287 F. 2d 750, 754 (C.A. 5). The present decree merely implements that principle.

Petitioners specifically challenge the decree insofar as it requires the desegregation of faculty and staff. Yet this provision is in keeping with the decisions of all the circuits, which, following this Court's decision in *Bradley* v. *School Board*, 382 U.S. 103, and *Rogers* v. *Paul*, 382 U.S. 198, have uniformly held the school board obliged to disestablish segregated patterns of faculty assignments attributable to the racial allocation of faculty under the dual system. *Clark* v. *Board of Education of Little Rock School District*, 369 F. 2d 661 (C.A. 8); *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158 (C.A. 10), affirming 244 F. Supp. 971 (W.D. Okla.), certiorari denied, May 29, 1967, No. 1268, O.T., 1966; *Wheeler* v. *Durham City Board of Education*, 363 F. 2d 738 (C.A. 4); *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865 (C.A. 5). Desegregation of faculty and staff is, moreover, an essential step in the elimination of the dual school system when a "freedom of choice" plan for student assignment is in effect. For the basic requirement of such a plan is that it offer each student a completely "free" choice, uninhibited by a practice—past or present—of the board based on racial segregation. See *Stell* v. *Savanah-Chatham County Board of Education*, 333 F. 2d 55 (C.A. 5), certiorari denied *sub*

nom. Roberts v. *Stell*, 379 U.S. 933; *Kier* v. *County School Board of Augusta County*, 249 F. Supp. 239, 246 (W.D. Va.). And this standard cannot be met where the boards continue to maintain schools identifiable as "Negro" schools or "white" schools by the racial composition of their faculty and staff. As the district court in *Kier* said (249 F. Supp. at 246):

> It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all-Negro teachers and administrative personnel. See Bradley v. School Bd., supra, 345 F. 2d at 324 (dissenting opinion). This encouragement may be subtle but it is nonetheless discriminatory. * * *

Nor is it realistic to suppose that an entrenched dual school system rigidly segregated according to race will automatically give way to an integrated unitary system without affirmative action. It is not enough merely to desist discriminatory practices; positive measures must be undertaken by the school authorities to accomplish the conversion. Accordingly, the court of appeals was fully justified in requiring the local boards to take whatever measures are necessary to achieve desegregation, including desegregation of faculty and staff. And, in the circumstances, it is appropriate to test the adequacy of those measures by the practical results.[9]

[9] The assertion of the petitioners in No. 301 (pp. 13–14) that the judgment below will require the Bessemer, Alabama Board of Education to abandon free choice, and overrule the

II

THE COURT BELOW WAS CLEARLY CORRECT IN FORMULATING A DETAILED DESEGREGATION DECREE TO BE APPLIED THROUGHOUT THE CIRCUIT

The desegregation plans approved by the district courts in these cases were purportedly free choice plans. But they were inadequate, the court of appeals held, in part because they failed to specify the procedures and mechanics for the operation of a free choice system. That, in the court's view, was a serious defect, since experience has demonstrated that—

> When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate. *Jefferson* I, p. 98.

That conclusion was supported by the record in these cases. Thus, although the plans in No. 256 (the Louisiana cases) stipulate that students would be assigned on a "freedom of choice" basis, the court found that, as administered by the board, they did no more

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choices of 3,202 Negro students, is wholly premature. The facts alleged in the petition are not in the record in this case; they have not been presented to the district court or court of appeals. If these allegations were submitted, we assume the district court would want to know much more, for example: how the Bessemer school board has assigned the over 1,600 Negro students who failed to exercise a choice; what choices have been exercised by white students, and where they have been assigned; how many teachers have been assigned on a non-segregated basis; what steps have been taken to equalize school facilities and curricula; and what further construction has taken place or is planned.

than "superimpose the same old transfer plan on racial assignments and dual zones." *Jefferson* I, p. 103. Nor can a free choice plan be effective to achieve a unitary system unless it contains "specific elements * * * that make it more than a mere word of promise to the ear." *Jefferson* I, p. 102. Accordingly, the court of appeals fashioned a specific decree and ordered its entry in each of the cases before it.

Complaint is made that the court also announced that the plan incorporated in the present decree would be used as a circuit-wide model. In light of what had gone before, however, that solution was wholly warranted. It is sufficient to quote the court's recitation of the experience which prompted the adoption of the expedient (*Jefferson* I, pp. 35–36):

> The first school case to reach this Court after *Brown* v. *Board of Education* was *Brown* v. *Rippey*, 5 Cir. 1956, 23[3] F. 2d 796. Since then we have reviewed 41 other school cases, many more than once. The district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation. In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistak-

> enly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color. [Footnotes omitted.]

At all events, the court was scrupulous to protect the rights of parties not before it. Although the model decree is presumptively applicable to any school system that adopts a "free choice" plan, it remains open to any party to a particular case to show that exceptional circumstances compel modification of the decree. *Jefferson* I, pp. 111–112.

CONCLUSION

The court below correctly defined the petitioners' constitutional duty and ordered the entry of a specific decree in accordance with that duty. No substantial questions are raised by the petitions, and the writ of certiorari should be denied.

Respectfully submitted.

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JULY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

JUL 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

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Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*

EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,
Petitioners,
v.
CLIFFORD EUGENE DAVIS, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NOS. 256, 282, 301

CADDO PARISH SCHOOL BOARD, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

BOSSIER PARISH SCHOOL BOARD, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

BOARD OF EDUCATION OF THE CITY OF BESSEMER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
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BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, *et al.*,
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EAST BATON ROUGE PARISH SCHOOL BOARD, *et al.*,
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v.

CLIFFORD EUGENE DAVIS, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

Citations to Opinions Below

The opinion of a panel of the Court of Appeals, December 29, 1966, is reported *sub nom. United States* v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966). A *per curiam* in the Baton Rouge case appears *sub nom. Davis* v. *East Baton Rouge Parish School Board,* 372 F.2d 949 (5th Cir. 1967). The opinion of the Court of Appeals on rehearing *en banc,* filed March 29, 1967, is not yet reported; it is appended to the petition filed in No. 256, as Exhibit L.

Opinions and orders of the District Courts, and opinions in prior proceedings in these cases are reported as follows:

Bessemer Case. The District Court order reviewed below, entered August 27, 1965 (R. Be. 85-86),[1] is unofficially reported *sub nom. Brown* v. *City of Bessemer Board of Education,* 10 Race Rel. L. Rep. 1015. A prior order entered July 30, 1965 (R. Be. 64-66) appears in 10 Race Rel. L. Rep. 1013. That order was vacated *sub nom. United States* v. *City of Bessemer Board of Education,* 349 F.2d 1021 (5th Cir. 1965) (*per curiam*).

Jefferson County Case. The District Court order entered August 27, 1965 (R. J. 70), is unofficially reported *sub nom. Stout* v. *Jefferson County Board of Education,* 10 Race Rel. L. Rep. 1030. A prior opinion and order of the District Court entered June 23, 1965 (R. J. 23, 27), are reported at 10 Race Rel. L. Rep. 1025. An order entered July 23, 1965 (R. J. 52), is unreported; it was vacated *sub*

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[1] Record citations are to pages in the records as printed for use in the Court of Appeals in these six separate cases. The following abbreviations are used to designate the respective records: Bessemer (Be.); Bossier (Bo.); Baton Rouge BR); Fairfield (F); Jefferson County (J); Caddo Parish (C).

nom. United States v. *Jefferson County Board of Education,* 349 F.2d 1021 (5th Cir. 1965) (*per curiam*).

Fairfield Case. The District Court order of August 23, 1965, and opinion dated September 7, 1965 (R. F. 65, 67), are unofficially reported *sub nom. Boykins* v. *Fairfield Board of Education,* 10 Race Rel. L. Rep. 1009.

Caddo Parish Case. The District Court orders of August 3, 1965, approving a proposed plan of desegregation (R. C. 291-298), and an order amending the plan on August 20, 1965 (R. C. 300-304) are unreported. A prior decree of the District Court is reported *sub nom. Jones* v. *Caddo Parish School Board,* 10 Race Rel. L. Rep. 1569 (June 14, 1965).

Bossier Parish Case. The order reviewed below, entered August 20, 1965 (R. Bo. II-261), is reported unofficially *sub nom. Jones* v. *Caddo Parish School Board,* 10 Race Rel. L. Rep. 1075. A prior order entered July 28, 1965 (R. Bo. II. 251), and unofficially reported in 10 Race Rel. L. Rep. 1074, was vacated by the Court of Appeals *sub nom. United States* v. *Bossier Parish School Board,* 349 F.2d 1020 (5th Cir. 1965) (*per curiam*). Other proceedings in this case are reported as *Lemon* v. *Bossier Parish School Board,* 240 F. Supp. 709, rehearing denied 240 F. Supp. 743 (W.D. La. 1965), affirmed 370 F.2d 847 (5th Cir. 1967), cert. denied 18 L.ed.2d 1350 (June 12, 1967).

Baton Rouge Case. The oral opinion of the District Court (R. BR. 242-250) and the order of the Court (R. BR. 158-159, 161-167) are unreported. Prior reported opinions in this case appear as follows: *East Baton Rouge Parish School Board* v. *Davis,* 289 F.2d 380 (5th Cir. 1961), cert. denied, 368 U.S. 831 (1961). *Davis* v. *East Baton Rouge Parish School Board,* 214 F. Supp. 624 (E.D. La. 1963); *id.* 219 F. Supp. 876 (E.D. La. 1963).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions for certiorari.

Question Presented

We adopt the question presented as stated in the Brief for the United States in Opposition, i.e.:

> "Whether the Court of Appeals for the Fifth Circuit correctly defined petitioners' constitutional duty to disestablish the dual systems of schools based on race and permissibly formulated a circuit-wide school desegregation decree."

Statement

This Brief in Opposition is submitted on behalf of the Negro pupils and parents who initiated school desegregation cases involving the public schools of the cities of Bessemer and Fairfield, Alabama, the schools of Jefferson County, Alabama, and of Caddo, Bossier and East Baton Rouge Parishes in Louisiana. In each of the cases, except the Baton Rouge case, the United States intervened as a plaintiff, and subsequently appealed a district court order approving desegregation proposals made by the school boards. The private plaintiffs, who also had opposed the boards' proposals at trial, were permitted to intervene as appellants in the Court of Appeals. The Baton Rouge appeal was pressed by the private plaintiffs.[2]

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[2] Other private counsel represent the Negro plaintiffs in the Jackson and Claiborne Parish and City of Monroe cases from Louisiana in No. 256; the United States has also participated in the Jackson and Claiborne cases.

Neither of the petitions for certiorari includes any reasonably detailed statement of the facts, the pleadings, or the desegregation plans approved by the district courts, and none of the petitions substantially relies on the facts of record as grounds for review. The Brief of the United States does contain a fair summary of the course of proceedings, the orders entered by the district courts, and the decree of the Court of Appeals. Accordingly, we omit any presentation duplicating that of the United States. But in view of the length of the records (totaling more than 1,800 pages in these six cases), we think it appropriate to make available to the Court a detailed recitation of the facts by reproducing as an appendix hereto the Statement submitted in our brief in the Court of Appeals on rehearing *en banc*. See appendix *infra*, pp. 1a to 46a.

ARGUMENT

In the years since *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, the Court of Appeals for the Fifth Circuit, and the district courts of that circuit, have engaged in a continuing process of development of the law of school segregation. The opinion below is another step in that development. It reflects the Court's long experience with the multiple manifestations of resistance to the *Brown* decision, from open defiance by public officials through the range of subtle evasions, and, of course, with delays, delays and more delays. The central fact of these particular cases as they were submitted to the Court of Appeals was that the school boards had done very little to change the pattern of racial segregation created under segregation laws and practices. As the Court of Appeals summarized this:

> In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools. (Jefferson I, p. 21.)[3]

The Court's footnote to the above gave this data:

	Total Enrollment		Negroes Admitted to Formerly White Schools
	W	N	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La. ..	2,394	3,442	5

(Affidavit of St. John Barrett, Attorney, Department of Justice, attached to Motion to Consolidate and Expedite Appeals.)

The companion case involving East Baton Rouge Parish, where litigation began in 1956, was similar: only 158 Negroes were in formerly white schools of a total of 21,708 Negroes and 33,186 white pupils in the system in 1965. (See Appendix *infra*, p. 39, and petition in No. 282, p. 66.) And, as the court below pointed out in 1965, there was no faculty desegregation at all in Alabama, Louisiana and Mississippi (Jefferson I, p. 21).

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[3] Here, as in the petitions and in the Brief of the United States, we use the pagination of the slip opinions reproduced by petitioners in No. 256, and refer to the panel opinion of December 29, 1966 (372 F.2d 836), as "Jefferson I" and to the *en banc* opinion of March 29, 1967, as "Jefferson II."

The plans approved by the trial courts in these cases contained no provisions for faculty desegregation, no relief with respect to construction programs under the dual systems, nothing eliminating discrimination and segregation in school facilities, services and programs, nothing providing for upgrading inferior schools or otherwise eliminating the demonstrated inequalities in the educational opportunities afforded Negroes, and no orders for desegregating transportation systems, nor for any progress reports to the courts, nor for individual notices to pupils and parents of their rights under the transfer and choice systems proposed by the boards of education. The plans in the Alabama cases continued the routine placement of all pupils on a racial basis, allowing Negroes to apply for transfers to white schools subject to various restrictions. The Louisiana plans provided initial assignments in certain grades based on choice, but reserved to the school authorities the right to reject choices and assign pupils in accord with unspecified standards and procedures. Pupils who did not apply for transfers were continued in their racially segregated assignments. In short, the plans approved by the district courts in these cases dealt in an inadequate way only with the question of pupil assignment; none of them contained adequate provisions *"to effectuate a transition to a racially nondiscriminatory School System."* *Brown* v. *Board of Education*, 349 U.S. 294, 301 (emphasis added).

Given this situation, it is hardly surprising that the entire *en banc* court of twelve circuit judges was agreed that the district court decisions in each of these cases must be reversed.[4] The petitioners have devoted little or no

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[4] Circuit Judge Bell, who dissented below, wrote:

"We should order the school boards in these cases, *which they and the entire court agree must be reversed*, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions." (Jefferson II, p. 63, emphasis added.)

argument to the defense of the district court plans in the petitions filed here.

Each of these school boards, like most boards in the Fifth Circuit, has proposed and argued in favor of student assignment under "freedom of choice" plans. Notwithstanding much of the argument in the petitions, which sounds as if free choice plans were rejected, the decree of the Court of Appeals approved the free choice plan for desegregation. The decree provides detailed requirements intended to safeguard free choice and to encourage abolition of the dual systems. It contains requirements for desegregation going beyond the mechanics of pupil assignments to strike at other basic characteristics of dual school systems. But essentially the decree provides for desegregation by free choice plans.

The main thrust of the petitions for certiorari—all the argument about racial balancing, claims of conflicts of circuits, and protests that the special punishment is being visited on southern school boards—is the boards' reaction to what they think the opinion portends for the future. The boards protest because the Court of Appeals has refused to give free choice plans a blanket endorsement for the future, and has said that if free choice plans do not in practice eliminate the dual systems which the States have created, other plans for desegregation may be required. This caveat, which we believe entirely consistent with the obligation of the courts under *Brown* v. *Board of Education*, 349 U.S. 294, to use "practical flexibility" in evolving remedies and appraising the "adequacy" of desegregation plans to reform dual systems, elicits vigorous protest for one principal reason: these school boards still resist desegregation and have retreated to free choice plans as "another line of defense" in their resistance to *Brown*. Cf. concurring opinion by Judges Sobeloff and Bell in *Bradley* v. *School*

Board of City of Richmond, 345 F.2d 310, 322, judgment vacated, 382 U.S. 108. Choice plans, almost unknown before the desegregation issue came to prominence,[5] have been chosen by many boards precisely because they were thought to promise the least change in the segregated status quo. Given the realities of life in segregated communities, the plans were viewed as least disruptive of segregation, promising to keep all-Negro schools virtually intact with minimum Negro transfers to white schools.

The Court of Appeals' promise that *de minimis* change will not suffice, that the evasive stratagems will not work, is what the noise is all about in these cases. But the Court of Appeals' promise for the future, presents no litigable matter today.

Surely the court below was precisely correct when it refused to bow to demands that it declare free choice valid for all times and places on the theory that abstractly it is "constitutional." Rather, as the court said:

> The governmental objective in this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective. (Jefferson II, p. 6.)

On the original arguments before a panel of the Court of Appeals, the Negro plaintiffs contended that free choice plans had produced so little reform of the segregationist regimes, and promised so little reform, that the court should reject them out of hand unless it was demonstrated that no alternative plans for desegregation were more

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[5] It must always be remembered that prior to the *Brown* cases, Negro children *as a class*, were considered as inferior beings and were relegated to segregated schools without any hint of choice, free or otherwise.

feasible in the particular communities. We still believe that in most communities in the deep South region, where segregationist sentiments prevail, where governors and legislatures still defy the *Brown* decision, and where Negro families risk their lives in choosing white schools, "freedom of choice" will prove to be a dismal failure, and will mean only continued segregation. But free choice plans with maximum safeguards (as in the decree below) had never really been tried in these communities, and a Court of Appeals plainly committed to equal educational opportunity indicated its view that the experiment with "real" free choice should be attempted. On reargument *en banc* the Negro plaintiffs acquiesced in the panel's decree and asked the court to affirm it. The experiment has now begun with spring registration during the past few months. The coming months, with periodic reports being filed under these plans, will provide evidence of the experience under the freedom of choice experiment. Review in this Court of the requirement that school boards adopt alternative plans, if free choice plans fail to produce reform, should await the entry or refusal of such an order. No order requiring any alternative to free choice is presented by these fundamentally moderate decrees. Each of the boards continues to function under a free choice plan.

The boards also contend that the provisions of the decree requiring desegregation of faculty and staff are improper. As the brief for the United States has shown, all of the Courts of Appeals considering this issue since *Bradley* v. *School Board,* 382 U.S. 103, have required faculty desegregation. (Brief for the United States in Opposition, pp. 9-10.) The courts have rejected arguments that the validity of faculty assignments in a racially segregated pattern was a matter to be determined differently in each case on the evidence of the effect of faculty seg-

regation on equality of educational opportunities. *Wheeler* v. *Durham City Board of Education*, 363 F.2d 738 (4th Cir. 1966). The invalidity of faculty segregation practices is plain. As this Court said unanimously in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 721:

> . . . [U]nder our more recent decisions any state or federal law requiring applicants for any job to be turned away because of their color would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

The boards' faculty segregation practices, thus, have no colorable claim to validity, and the order forbidding them presents no substantial question for review.

The petitions also attack the effort of the court below to prescribe uniform standards circuit-wide for school districts which adopt plans based on freedom of choice. The Court of Appeals' opinion adequately justifies this measure and the details of the plan, by reference to the inherent difficulties involved in administering free choice plans, and by reference to its long experience in reviewing desegregation cases. That experience includes experience with plans approved by the district courts which were uniform, but uniformly inadequate. (See, for example, the five substantially similar plans approved in the Western District of Louisiana; petition in No. 256, pp. 44-76.) Nor was the court unaware of the difficulty presented by the attitudes of some district judges who candidly announced their opposition to the *Brown* decision. See, for example, the opinions of Judge West in *Davis* v. *East Baton Rouge Parish School Board*, 214 F. Supp. 624 (E.D. La. 1963), and the recent opinion denouncing the *Jefferson* decree as

"ridiculous" on May 8, 1967, which is appended to the petition filed here in No. 282, pp. 51-63. Cf. the remarks of Judge Dawkins who announced in the *Caddo Parish* case that he ordered desegregation "not willfully or willingly, but because we are compelled by decisions of the Supreme Court . . . [and] . . . the Fifth Circuit . . ." (R. C. 131). But, of course, notwithstanding the specificity of the decree, it plainly left the district courts the power to order modifications upon proper showings (Jefferson I, pp. 111-112), with the court indicating that the decree contemplated "continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation 'to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems.'" (Jefferson I, p. 115).

The petitions attack the opinion below for "punitive sectionalism," asserting that southern boards are being prohibited from engaging in practices which northern boards are allowed to continue. The opinion below expressly disclaimed any attempt to decide issues involving de facto segregation in other parts of the country:

> We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts. (Jefferson II, p. 5, n. 1.)

In face of this disclaimer the charge of "sectionalizing" the Constitution is an invention if it suggests anything like a legal double standard; it is a truism if it merely describes the refusal of the court to decide issues presented in other parts of the country and not present on these records.

There is something grandly audacious in the boards' arguments about "racial balancing" and claims of parity

with "de facto" segregated patterns in communities that never had segregation laws. Such arguments, it must be noted, are tendered for systems such as Caddo Parish, where the record showed one Negro pupil out of a total of 24,467 in a school with white children; for three Alabama districts where all initial assignments were made on the basis of racial segregation; and for Bossier Parish, where an expert comparison of Negro and white buildings showed fifteen of the seventeen white schools rated above the top Negro building (see appendix *infra*). The court below understood the prevailing attitudes of the school systems to which the decree was directed. See, for example, the response of the Bossier Parish School Superintendent to a written interrogatory inquiring about obstacles to desegregation in the most "federally impacted" community of its size in the South (R. Bo. Vol. I, p. 56):

> Bossier Parish, Louisiana can properly be termed a "hard core" segregation area. The people in Bossier Parish have strong and fixed opinions in opposition to integration. People here feel that negroes in Bossier Parish are treated fairly and with justice and there has been an unusual degree of racial harmony. Indeed, from the negroes in Bossier Parish there has been no desire expressed for integration of the races other than that which come from Barksdale Air Force Base; that is, from non-Bossier Parish negroes.
>
> In contrast to some other areas of the South which have maintained segregated school systems, Bossier Parish is not ready for integration.
>
> /s/ EMMETT COPE
> Emmett Cope, Individually and on behalf of the Bossier Parish School Board

This in March 1965! It is fortunate that the Fifth Circuit understands the problem as well as the opinion below attests.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these petitions for writs of certiorari should be denied.

Respectfully submitted,

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Statement

This consolidated Brief on Reargument is submitted on behalf of the Negro pupils and parents who, as private parties plaintiff, initiated these six school desegregation suits involving the public schools of the cities of Bessemer, and Fairfield, Alabama, Jefferson County, Alabama, and Caddo, Bossier, and East Baton Rouge Parishes in Louisiana. In each of the cases, except No. 23,116, *Davis* v. *East Baton Rouge Parish School Board,* the United States of America intervened as a party plaintiff and appealed from a district court order approving a proposed desegregation plan. The private plaintiffs in these cases were permitted to intervene as appellants in this Court. In the *Davis* case, *supra,* the appeal from a district court order approving a desegregation plan was taken by the private plaintiffs.

Several briefs have been submitted before and after the original arguments in these cases. However, in order that the entire Court may have access to a statement of the proceedings and facts in each case, in a single volume, we restate them below. The opinion of the panel of this Court which decided the cases on the original arguments stated that the Court had "carefully examined each of the records" and that: "In each instance the record supports the decree" (Slip Opinion, p. 111). We agree.

I. *No. 23,335, United States, et al. v. Board of Education of the City of Bessemer*

The complaint in this action was filed by Negro students and parents on May 24, 1965, to desegregate the public schools of Bessemer, Alabama (R. 11-19). The City of Bessemer maintained ten schools for the 5,286 Negro and 2,920 white pupils enrolled during the school year 1964-65

(R. 100). The system has 1 white high school (grades 10-12), 1 white junior high school (grades 7-9), 4 white elementary schools (grades 1-6), 2 Negro schools offering grades 1-12, and 2 Negro schools offering grades 1-8 (R. 95-97).

The procedures in the Bessemer desegregation plan presently before this Court adopt with minor modifications pupil assignment procedures utilized by the Bessemer board prior to the plan to maintain a rigidly segregated public school system. Detailed descriptions of these assignment procedures, of other aspects of the system, and of the approved plan follow:

A. Pupil Assignment Policy

Bessemer maintained a dual system of schools, "one set of schools for Negroes and one set for whites," at the time this action was filed (R. 116). One map sets out the attendance zones for each of the 4 Negro schools (R. 95) and a second map sets out zones for each of the white schools (R. 96). When asked at the hearing below if the racial zone maps were "being used at the present time," the Superintendent responded: "To the best of my knowledge, we are still following these maps" (R. 98). Counsel for the board asked that these maps be withdrawn from the court at the conclusion of the hearing because "Dr. Knuckles has told us these are maps we need constantly" (R. 99).

The board also maintained a map showing the residence and race of each student and location of each of the schools within the system, with "red dots showing the location . . . of the Negro pupils" and "green dots indicating the residential location of the white pupils enrolled in school during this year" (R. 105-106).

The superintendent testified that the school system "is geared to placing students in schools that are closest to their neighborhood" (R. 108). Yet, adherence to a policy of strict separation of the races in the schools did not always result in students being so assigned. Superintendent Knuckles further testified:

> Q. Do you have very many students who are at the present time passing by schools which are closest to their neighborhood? A. I am sure we have some.
>
> Q. Do you have any of your white students . . . who are passing by Negro schools to go to white schools? A. I expect there are some.
>
> Q. And vice versa? A. And vice versa, yes sir. (R. 108-109)

Some students were required to pass a school maintained for children of the opposite race and "cross a railroad track and some more than one railroad track" to reach a school maintained for their race (R. 159).

School zone lines were changed periodically as conditions changed, and in some instances the superintendent and the board "have administratively transferred the pupils who live in a particular area from one school to another as the school was built or as a school was added to or particular facilities were abandoned" (R. 146). The superintendent testified that when a particular zone contained more students than the school could accommodate "we just had to arbitrarily assign them to another school" (R. 147).

Through this system of assignments the schools within the City of Bessemer were kept completely segregated. No white students attended Negro schools and no Negroes attended white schools (R. 28).

B. The Plan Approved by the Court Below

On July 30, 1965, the court below entered an order approving with minor modifications the first plan submitted by appellees (R. 64-66). An appeal was taken from that order and on August 17, 1965, this Court vacated the judgment and remanded for further consideration, *United States* v. *City of Bessemer Board of Education*, 349 F.2d 1021 (5th Cir. 1965) (R. 71-72). Thereafter, appellees filed an amended plan (R. 81-84) which was approved by the court below on August 27, 1965 (R. 85-86). The amended plan is the subject of this appeal.

The plan adopts the racial assignment policy based upon a dual set of zones described above, subject to minor modifications. Initially, pursuant to the plan, "all pupils in all grades of the Bessemer system will remain assigned to school to which they are assigned or will be assigned to schools in accordance with the custom and practice for assignment of pupils that have prevailed in the school system prior to the entry of the judgment of the District Court in this case on June 30, 1965, such method of assignment being necessary in order to prevent a disruption of the school system and to maintain an orderly administration of the schools in the interests of all pupils" (R. 45-46).

Students entering the first grade are specifically required to report to the elementary school located in the zone *maintained for their race*—Negro students reporting to Negro schools and white students reporting to white schools (R. 44). Only after this segregated racial assignment procedure may "an application may be made by the parents for the child's assignment to any school (whether formerly attended only by white children or only by Negro children)" (R. 44).

Similarly, students in all other grades are initially assigned to segregated schools maintained by appellees for

students of their race (R. 45).[1] Once assigned to these schools, students in grades 1, 4, 7, 10 and 12 during the school year 1965-66, students in grades 2, 3, 8 and 11 during the school year 1966-67, and students in grades 5, 6 and 9 during 1967-68 may apply for transfer "to a school heretofore attended only by pupils of a race other than the race of the pupils in whose behalf the applications are filed" (R. 43-44, 88-83). Transfer forms must be picked up, completed, and returned to the superintendent's office during the designated transfer period (R. 82).

Transfer applications will thereafter "be processed and determined by the board pursuant to its regulations as far as is practicable" (R. 44).[2] No regulations were ever introduced, and on cross-examination the superintendent was unable to say what regulations were referred to by

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[1] Q. Am I correct that the plan in essence will assign particular schools on the basis of race? A. Most of the pupils in Bessemer with the exception of the first graders are presently assigned to schools they are enrolled in and their records are there.

Q. Even in the grades you are desegregating you contemplate they will attend the school that heretofore has been for their race unless a transfer application is filed and approved? A. That is correct. (R. 264)

[2] Prior to the adoption of the plan and the possibility of desegregation of the schools, the board liberally granted transfers.

Q. Is it fair to say you granted that request more or less as a matter of course as long as there was capacity in the school to which they were transferring? A. I think that is true. We attempted to accomodate people where we didn't overburden the school, the classes or the teachers. (R. 148)

• • •

Q. Mr. Knuckles, you have testified in answer to some of my questions about transfers from one zone to another. Have they been initiated normally by either a letter or a telephone call? A. Yes, sir.

Q. No particular form being used? A. No form.

Q. And there has been no time limit for submitting them to the board? A. No, but I did tell you we have discouraged transfer during the school year.

Q. After school is started? A. Yes, sir.

the plan or their subject, except that they were "general regulations under which we have operated for a long time" (R. 260).

The above described transfer requirements do not apply to Negro students applying for transfers from one Negro school to another Negro school or to white students applying for a transfer from one white school to another white school.

> The Court: I think this plan after the first paragraph only refers in cases where Negro pupils apply to transfer to schools heretofore attended only by white pupils in these classes and vice versa. I think that is the plan.
>
> Q. Is that the way you expect to administer the plan? A. Yes, sir.
>
> Q. So that procedure will be used only when a Negro applies to attend a white school or a white applies to attend a previous Negro school? A. In these grades. (R. 261)

Students new to the system are similarly assigned on the basis of race.[3] The plan is silent and the board is undecided on how applications to overcrowded schools will be processed.

> Q. If a Negro child applies for the Bessemer Junior High School [a white school] in the seventh grade, a

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[3] A. They will appear at a school to enroll and will abide by the same regulations. If a child asks to transfer to the school of another race and it is after the deadline date, I would assume that he, like other children who let the deadline pass for this time, just wait until his grade is open at another time.

Q. Dr. Knuckles, a white child moving into the school district and is due to enter the seventh grade will automatically go into the seventh grade without making out any papers at all in a white school? A. A Negro child would do the same thing in a Negro school. We are proposing in this instance to follow the custom that has been followed for some time in the interim period. (R. 265)

desegrated [sic] grade, and lives closer to Bessemer Junior High School than white children who will seek enrollment in the Junior High School, is there any decision which will have priority under the plan? Which will have priority if there isn't room for both? A. That question has not been determined.

Q. You don't know? A. That is correct.

Under the plan students will not be permitted to transfer from a school to which they are racially assigned to a school maintained for children of the other race to take a course not offered at their school unless the student is enrolled in a grade reached by the plan.[4]

The plan provides for notice through publication in a local newspaper. No individual notices are contemplated (R. 266).

C. Faculty and Administrative Assignments

The plan makes no provision for non-racial faculty assignments.

The board employs 285 classroom teachers, 175 Negro and 110 white (R. 115). For the 1964-65 school year the board had a teacher turnover rate of 11.85% (R. 119). The superintendent testified that all Negro teachers in the system have met the minimum requirements of the board and that they possessed "the same or similar qualifications as . . . white teachers" (R. 122, 123).

The faculty remains totally segregated with Negro teachers instructing Negro students and white teachers

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[4] Q. And it [the transfer application] will be considered even though the child is in a grade that has not yet been reached by the plan? A. I think we will live with and operate under the provisions laid out in this plan during this interim period.

Q. And that is your answer to that question? A. Yes, sir. (R. 267)

instructing whites (R. 120). The board has considered desegregating the faculty but has not reached a conclusion "simply because the request had not come from parents at the time for the assignment of Negro children to schools other than those they were attending" (R. 118-119).

Teachers were freely assigned by the board when such transfers met the administrative convenience of the district. "[W]e had three rooms in this small school and we closed them and moved the children to one of the larger schools and moved the teachers and consequently we saved the operational cost of that building" (R. 244).

Faculty meetings are held on a segregated basis (R. 251). Administrative and supervisory staff is also segregated. Of 10 administrators employed by the board, 9 are white. The one Negro administrator is in charge of Negro schools (R. 116) and is provided an office apart from the other administrators in a Negro school. No Negroes work in the central office (R. 118).

D. Inequality

The record contains many examples of the inequality between Negro and white schools, including:

1. *Pupil-Teacher Ratios* (R. 162-164):

Negro High Schools	*White High School*
Carver 25 "plus"/1	Bessemer H. S. 19.08/1
Abrams 25/1	

2. *Library Books per Pupil* (R. 164-165):

Abrams 8/1	Bessemer H. S. 19.08/1
Carver 3.17/1	

3. *Elective Subjects Offered in High Schools*

The superintendent admitted that more electives were offered in the white than the Negro high school but attributed this disparity to "community pressure" (R. 166). Latin, Spanish, and two years of French are offered in the white high school; the only language taught in the Negro high school is one year of French. Journalism is taught in the white but not the Negro schools (R. 167-168, 229, 233-234).

The plan makes no provision for equalizing the facilities between Negro and white schools.

E. School Construction

The Bessemer school district contemplates expending approximately $460,000 for rebuilding or adding to existing segregated facilities (R. 125). The plan makes no provision to require that a rebuilding program be designed so as to aid in abolishing the dual system.

F. Other Matters

The plan contains no provisions for individual notice to pupils, no provision with respect to locating new school buildings or additional facilities in such a manner as to eliminate segregation, no provisions with respect to nondiscrimination in various school connected or sponsored activities or in extracurricular activities, and no provisions with respect to periodic reports to the court concerning desegregation.

G. Administration of the Plan

In the first year of the plan, 1965-66, only 13 of approximately 5,284 Negroes attended formerly white schools. (Affidavit of St. John Barrett attached to Motion to Con-

solidate and Expedite Appeals in these cases, filed in this Court April 4, 1966.) In the second year of the plan, the current 1966-67 term, about 64 Negro pupils attend formerly white schools. (Information supplied to intervenors and appellants by U. S. Department of Health, Education and Welfare.)

II. *No. 23,345, United States, et al. v. Jefferson County Board of Education*

This action was filed June 4, 1965, by Negro students and parents against the Jefferson County Board of Education requesting that the board be enjoined from continuing to operate a system of dual and unequal public schools (R. 9-16). The Jefferson County Board of Education maintains approximately 117 schools for 45,000 white students and 18,000 Negro students (R. 80).

The procedures incorporated in the plan for desegregation approved by the court below (R. 30-37, 66-68), adopt with minor modifications the pupil placement procedures utilized by the Jefferson County Board of Education since 1959 to maintain a rigidly segregated public school system. Descriptions of these pupil assignment procedures, of other aspects of the system, and of the plan follow.

A. Pupil Assignment Procedures

From 1959 until adoption of the plan under consideration in 1965 the Board assigned all pupils pursuant to a pupil placement plan (R. 96-107). During this period the district remained completely segregated. On June 22, 1965, Superintendent Kermit A. Johnson testified that "at the present time" Negro and white children are separated within the school district.[5] Total separation of the races

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[5] Q. Heretofore, and at the present time, it is the policy of the Board of Education to separate Negro and white children in the school; isn't that true? A. We have had them separated, and there has not been any

within the Jefferson County School District was effected by utilizing the following pupil assignment procedures:

a. *Assignments:* Students entering the first grade, students newly moving into the jurisdiction of the board, and students residing within the district who have been attending school in another "school community" [6] were "accepted, approved and enrolled" by a principal to his school upon determining that the student resides in his "school community" and that the student "would normally attend his school." [7] (R. 101-102). Without exception, students assigned to schools they "would normally attend" resulted in Negroes being assigned to Negro schools and whites being assigned to white schools (R. 164).

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other operation up until this point. I would hesitate to say the policy of the Board, because we have not had an application up until this time.

Q. But the Board has never authorized you— A. Never taken the initiative for it or authorized me to make any changes. (R. 94)

[6] Dr. Johnson described how a principal would define the boundaries of his "school community" as follows:

A. They are not defined except those who live relatively close to the school and then there is a broad area there where they might go to his school or some other school and this is a case where he would raise the question whether he should or shouldn't take such students.

Q. You state the only way the principal of any school would know what pupils reside in his school community is on the basis of addresses of the students already in school and who had attended the school in the past? A. That is one of the best guides. He doesn't have a definition of a school community. It is a general thing. We don't have the geographical zones. In general it is always the closest to his school would go to his school. (R. 163)

[7] "How would a principal of a white school, elementary school, know who would normally attend his school? What students would normally attend his school? A. Well, there would be the brothers and sisters of the students he had who lived in that general area.

Q. Assuming a Negro child or a white child lived next door to one another, would that child be a person the principal would consider normally would attend his school? A. In the past they would not come under the general definition of "normally attending that school." (R. 163-164)

b. *Transfers:* Students who desired to attend a school other than the one they "would normally attend" (a school provided exclusively for students of the white or Negro race) or the school within his "school community" (the school nearest his home) were required to apply for a transfer (R. 101-104). Requests for transfers were granted only by the Central Office (R. 101-104). Seventeen "factors" were considered by the Central Office in evaluating transfers.[8] The list includes such matters as "home environment," "severance of established social and psycho-

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[8] The 17 factors (R. 103-104):

"Assignment, transfer and continuance of pupils; factors to be considered—

1. Available room and teaching capacity in the various schools.
2. The availability of transportation facilities.
3. The effect of the admission of new pupils upon established or proposed academic programs.
4. The suitability of established curricula for particular pupils.
5. The adequacy of the pupil's academic preparation for admission to a particular school and curriculum.
6. The scholastic aptitude and relative intelligence or mental energy or ability of the pupil.
7. The psychological qualification of the pupil for the type of teaching and associations involved.
8. The effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof.
9. The effect of admission upon prevailing academic standards at a particular school.
10. The psychological effect upon the pupil of attendance at a particular school.
11. The possibility or threat of friction or disorder among pupils or others.
12. The possibility of breaches of the peace or ill will or economic retaliation within the community.
13. The home environment of the pupil.
14. The maintenance or severance of established social and psychological relationships with other pupils and with teachers.
15. The choice and interests of the pupil.
16. The morals, conduct, health and personal standards of the pupil.
17. The request or consent of parents or guardians and the reasons assigned therefor."

logical relationships" and the "morals, conduct, health and personal standards" of the pupil requesting transfer (R. 103-104, 158). Applications for "transfers"[9] required the signature of both parents, the occupation and name of the employer of both the students' mother and father or guardian, the race of the applicant. This information was to be included upon a transfer application and submitted to the Superintendent's Office. In considering transfer applications:

> "[T]he superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse satisfactory to the superintendent or the board, failure to appeal for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application." (R. 100).

Superintendent Johnson testified that he never notified parents, students or anyone else in the County that Negro pupils could request assignment to a white school (R. 143). No Negro ever applied for a transfer to an all-white school (R. 94). During 1964-65, 200 requests for transfer were made and 95% were granted (R. 157), but none of these were requests for desegregation (R. 94). No transfer period was designated; requests could be made at any time (R. 93).

c. *Reassignments:* Once enrolled, either by assignment or transfer "[A]ll school assignments shall continue without change until or unless transfers are directed or ap-

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[9] Plaintiffs' Exhibit 2-A (R. 97-98).

proved by the superintendent or his duly authorized representative." (R. 99). Negro elementary school graduates were automatically assigned to a Negro junior high school and Negro junior high school graduates were automatically assigned to a Negro senior high school. Similarly, white students were automatically assigned on a racial basis.[10] The district specifically recognized these automatic assignments or "feeder" arrangements: "An application for Assignment or Transfer of Pupils Card must be filled out for each pupil entering your school for the first time either by original entry or transfer *except pupils coming from feeder schools.*" (R. 101) (emphasis supplied). Thus students were initially assigned to segregated schools and thereafter locked into these assignments. This lock-in effect continued on throughout the students' public school career.

Assignments—whether through transfer, reassignment or initial assignment—were all made to schools which were admittedly constructed exclusively for students of the white or Negro race (R. 130-131). Even as to proposed future school construction, the Superintendent was able to identify the race of the students for whom schools were planned but not yet constructed (R. 131-132). Racial dot maps, indicating the race and residence of every student within the district, are maintained by the Board (R. 89).

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[10] Q. What about students who are, for example, in the sixth grade going to the seventh grade in another school that is separate and distinct? A. Their names are passed over to the high school principal from the elementary principal and their permanent records kept in the individual folders. Every child has a folder with his records in it. They are passed on to the high school and by that procedure the principal knows the number and who it is he is expecting.

Q. That is an automatic process? A. That has been the way it has operated in the past. (R. 195)

B. The Plan Approved by the Court Below

On July 22, 1965 the court below entered an order approving the first plan submitted by appellees (R. 52-53). The United States appealed that order and on August 17, 1965 this Court vacated the judgment and remanded the cause for further consideration. *United States* v. *Jefferson County Board of Education*, 349 F.2d 1021 (5th Cir. 1965). Thereafter appellees filed an amended plan (R. 66-68) which was approved by the court below on August 27, 1965. This amended plan is the subject of this appeal.

The amended plan adopts the pupil assignment procedures discussed above—procedures which effectively perpetuated a totally segregated dual system of schools—subject to the following modifications:

1. Every student is initially assigned to a segregated school. Students entering grades 1, 7, 9, 11 and 12 during school year 1965-66, grades 2, 3, 8 and 10 during 1966-67 and grades 4, 5 and 6 during 1967-68 may therafter apply for a transfer from the segregated schools they are initially assigned to. Transfer applications are to be considered in light of the "factors" set out in footnote 8, *supra*.[11] Transfer applications must be picked up and completed application forms must be deposited at the office of the superintendent (R. 67).

2. Students entering grade 1 shall register at schools provided for students of their race—Negro students at Negro schools and white students at white schools. Any entering first grade student may apply for a transfer to another school by following the steps set out in para-

[11] White students are thereby insured of space in the formerly white schools. Applications for transfer by Negro students are to be considered in light of the space available at the school applied for. A ground for rejecting an application is overcrowding. See footnote 8, *supra*.

graph 1 above only after registering at a segregated school (R. 164).

3. Negro students new to the district may attend a school formerly provided for whites only if the student is entering a grade being desegregated under the plan (R. 213).

4. Notice of the plan shall be published three times in a newspaper of general circulation within the county (R. 34).

Superintendent Johnson was asked:

> Q. How then does this plan change the method of assignment which by your testimony has not resulted in any Negro attending any white school and white attending any Negro school? A. The biggest change I can think of is this will be the first time we have advertised the fact in the daily newspapers that they may do this and the requests will be considered seriously and probably approved. We have never done that before and this would be a change (R. 162).

Appellees' plan permits Negroes to transfer out of the segregated schools to which they are initially assigned, providing they submit a request for transfer on a form which they must pick up at, and after completion deliver to, the superintendent's office; and, they are not disqualified by one or more of the 17 tests set out in footnote 8, *supra*.

Superintendent Johnson's justification for initially assigning all entering Negro first graders to Negro schools is "we feel this would be the logical place for him to go. His brothers and sisters have gone there in the past and he would be in an atmosphere of people he had known

in the past and we think it is the easiest way for him to make his wishes known" (R. 164).

C. Faculty Assignments

The plan contains no provisions for ending faculty assignments based on race.

The board employed a total of 2,268 school teachers, including approximately 600 Negroes (R. 118). All Negro teachers possess qualifications required by the school board (R. 121); 35 white teachers failed to fulfill the school board's minimum requirements (R. 136-137). Negro teachers teach only Negro students (R. 121). White teachers teach only white students (R. 122). Negro supervisory personnel are confined to supervising Negro students and schools (R. 122) and are provided offices apart from white supervisory staff (R. 123, 144). Teacher turnover within the system averages approximately 13% per year (R. 120). Dr. Johnson testified that the 2,200 teachers in the system were qualified to each any child in the system within their subject specialty but that "the main problem" to teacher desegregation would be "acceptance on the part of the parents" (R. 135), and Negro teachers would encounter difficulties in teaching white students "because of the traditions and practices of our people up until this time" (R. 144).

D. Bus Transportation

The plan contains no provision for desegregating transportation facilities.

The 253 buses maintained by the district were operated on a segregated basis (R. 123-124) pursuant to separate route maps—one setting out routes for Negro students and a second for white students. These routes overlapped each other in some instances (R. 127-128).

E. Inequality in Facilities for Negroes

The plan contains no provision for eliminating various tangible inequalities in the facilities for Negroes and whites.

The superintendent testified that although there is only one vocational school for white boys, Negro high schools have comparable vocational subjects not offered in white schools (R. 146). The only high school not accredited by the Southern Association is Negro Praco High which the superintendent said had not applied for an accreditation (R. 220). The Negro Rosedale school has grades 1-12; white Shades Valley school has grades 10-12 (R. 221). The two schools are about half a mile from each other. Rosedale has five or six acres; Shades Valley has about twenty acres. Shades Valley has an auditorium, a stadium and a separate gymnasium; Rosedale lacks a stadium and a gymnasium (R. 221-222, 232).[13] Although the superintendent could name five white schools having summer school sessions, he could not "recall" other schools having such sessions (R. 232). Negro Gary-Ensley Elementary School has outdoor toilet facilities (R. 234). In Negro Docena Junior High School, there are pot-bellied stoves rather than central heating. Students must go a block away to use indoor toilet facilities (R. 233-34). The superintendent could not recall a Negro school which had a stadium with seats and lights. He stated that Negroes have not wanted to play football at night (R. 235). Most stadiums and lights, including an $80,000 stadium at white Berry High School, have been provided, according to the superintendent, by citizen efforts (R. 235-36). He did state, however, that the school system gives assistance to

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[13] By way of contrast to the Rosedale-Shades Valley situation, the superintendent testified that Negro Wenonah *High* School had facilities superior to white Lipscomb *Junior High* School (R. 240-41).

such efforts by grading the ground and furnishing the light fixtures (R. 236).

An appendix to Intervening Plaintiff's Exhibit No. 1, shows that of the 79 white and 32 Negro schools listed, 81.3% of the Negro schools and only 54.4% of the white schools had a student enrollment above capacity. Thus 33.3% of the Negro students (or 4,587 Negroes) were enrolled in schools having over capacity population, while only 10.1% of the white students (or 4,125 whites) were enrolled in such schools. The United States also proved that 45.6% of white schools but only 18.7% of the Negro school enrollments were under capacity (R. 203).

F. Others Matters

The plan contains no provisions for individual notice to pupils, no provision with respect to locating new school buildings or additional facilities in such a manner as to eliminate segregation, no provisions with respect to non-discrimination in various school connected or sponsored activities or in extracurricular activities, and no provisions with respect to periodic reports to the court concerning desegregation.

G. Administration of the Plan

In the first year of the plan, 1965-66, only 24 of approximately 18,000 Negroes attended formerly white schools. (Affidavit of St. John Barrett attached to Motion to Consolidate and Expedite Appeals in these cases, filed in this Court April 4, 1966.) In the second year of the plan, the current 1966-67 term, about 75 Negro pupils attend formerly white schools. (Information supplied to intervenors and appellants by U. S. Department of Health, Education, and Welfare.)

III. *No. 23,331, United States, et al. v. Fairfield Board of Education*

The board maintains nine public schools in the City of Fairfield, Alabama which serviced a total school-age population of 3,095 children during the 1964-65 school term. Of this number 2,273 were Negro and 1,822 were white (Intervenor's Exhibit No. 3).

By long term policy and practice, the board segregates Negro school children from white school children through the use of dual racial school zones (R. 182, 183, Intervenor's Exhibit 3). In 1954 Negro parents petitioned the board to desegregate the schools and again in May, 1965, Negro parents petitioned for desegregation. The board did not respond to either petition (R. 125-27, 220-23). On July 21, 1965, Negro parents and school children brought suit against the board asking for a preliminary and permanent injunction against continuing segregation of students and teaching staffs (R. 14-23). The district court found there was an illegally segregated system in Fairfield (R. 84), and pursuant to a court order the board filed a Plan and later an Amended Plan for Desegregation of Fairfield Schools System (R. 59).[13]

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[13] On August 17, 1965, the board filed a Plan for Desegregation of Fairfield School System (R. 48), which the court failed to approve. This first plan provided in part that

(1) Negro children in the 9th, 11th, and 12th grades would be permitted to apply for transfers which transfers would "be processed and determined by the board pursuant to its regulations . . ." (R. 49).

(2) Negro children entering the 1st grade would be assigned to Negro schools, but if both parents accompany the child and sign an application on the first day of school, the child would be permitted to apply to a white school (R. 50, 151-155).

(3) Applications to be acted upon for the 1965-66 term had to be filed at the office of the board between 8:00 A.M. and 4:30 P.M. on August 30, 1965 (R. 50, 151).

(4) During the 1966-67 terms, the 2nd, 3rd, 8th and 10th grades would be desegregated. During the 1967-68 terms the remaining 4th, 5th, 6th

The amended plan, which the district court approved, provides that:

(1) Negro students in the 7th, 8th, 10th and 12th would be allowed to apply for transfer to white schools if their applications were submitted to the board on or before August 30, 1965, the applications to be processed by the board "pursuant to its regulations" (R. 60).

(2) Negro children entering the 1st grade must attend a Negro school unless the parents of the child on the first day of school apply for his assignment at a white school (R. 61).

(3) Applications of Negro children for admission to white schools or white children to Negro schools are to be reviewed by the superintendent "pursuant to the regulations of the board" (R. 61). (A similar process is not required for applications of Negroes for transfer to Negro schools or white children to white schools.)

(4) During the entire month of May 1966 applications by Negro children for transfer to white schools in the 2nd, 3rd, 9th, and 11th grades for the 1966-67 school term will be accepted. (No provision is made for publication of notice prior to May of 1966) (R. 61-62 and 157-158).

(5) During May of 1967 applications by Negro students for transfer to the remaining segregated 4th, 5th, and 6th grades will be accepted by the board for the 1967-68

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and 7th grades would be desegregated. Applications by students entering desegregated grades would be accepted from the period of May 1 through May 15 preceding the September school term opening for the desegregated grades (R. 50-51).

(5) Unless Negro students applied for and obtained transfer, they would be assigned to Negro schools (R. 51).

(6) The Board would publish in a newspaper of general circulation the provisions of the plan on three occasions prior to August 30, 1965 (R. 51).

school term. (No provision is made for publication of notice prior to May of 1967) (R. 62 and 157-158).

(6) Except for those students applying for and receiving transfer, the schools within the Fairfield system will remain segregated.

(7) One notice of the plan is to be published for three days prior to August 30, 1965 (R. 63).

The plan is silent as to admission of named plaintiffs, desegregation of faculty and extracurricula activities, abolition of dual zone lines, and filing of progress reports with the Court. The plan also does not mention the construction and location of new schools and their effect on desegregation.

Under the plan, transfer applications are not granted as a matter of course, but the board, in its discretion, may deny transfer (R. 149, 166).

As understood by school officials, the plan requires both parents request transfer to a white school before an application will be considered (R. 150-152). This is also true for students applying to the first grade, although they are required to present themselves at schools with an application signed by both parents and application forms are not available prior to the time of initial enrollment (R. 153). Transfer forms are distributed to principals of schools in Fairfield but are not distributed to parents or students unless a request is made of the principal (R. 154). A Negro unable to obtain certain courses because they are taught only in the white schools will not be considered for transfer unless the plan covers the grade in which he is enrolled (R. 159). The plan is also silent as to the standards to be applied to transfer requests from students moving into the district subsequent to the transfer period (R. 158).

Prior to desegregation the board permitted applications for transfer during a three-month period but the desegregation plan reduces this period (R. 145). When asked by the district judge to explain why "such a restrictive period" had been decided upon the superintendent stated:

> My reaction to that point would be we are moving, it seems, from a segregated school to an integrated school system, and the rules of the game are just going to be different in the future from what they have been in the past (R. 145).

The record shows that the tangible facilities and services available at the Negro and white schools are not equal. The white schools in the City of Fairfield are organized on a 6-3-3 plan, i.e, the first six grades in an elementary school; the seventh, eighth, and ninth grades in a junior high school; and the tenth, eleventh, and twelfth grades in a senior high school (R. 87, 96, 189-190). Although the 6-3-3 system is thought to be the most educationally sound school-organization plan by the school authorities, Negro schools are not organized on a 6-3-3 plan (R. 87, 96, 189-190, 192).

The teacher-pupil ratios for the 1964-65 school term at the various schools are these:

Negro	*White*
Grades 1–6	
Robinson 34/Teacher	Forest Hills 26/Teacher
Englewood 25/Teacher	Donald 26/Teacher
Grades 7–9	
Interurban 35/Teacher	Fairfield Junior High 28/Teacher
Grades 10–12	
Industrial High 29/Teacher	Fairfield 20/Teacher

(Computed from Intervenor's Exhibits No. 3)

The plant facilities provided for the Negro children are inferior to those provided for white students. The buildings are in disrepair (R. 217-218, 207-210); the lavatory facilities are unusable, in part, or otherwise of inferior quality or condition (R. 108-109 and Defendant's Exhibits 7 & 8). Vermin and ants have been found in eating facilities (R. 164-167, 218) and there is little recreational area provided around the Negro schools while each white school is provided with ample grounds (R. 91-93, 97, 98, 210, 211, 212, 218). The per pupil values of the plant facilities of the Fairfield school system are these:

Negro		*White*	
Robinson Elementary	$ 258	Donald Elementary	$ 743
Englewood Elementary	492	Forest Hills Elementary	920
		Glen Oaks Elementary	817
Interurban Junior High	130	Fairfield Junior High	699
Industrial High	1,525	Fairfield High	2,476

(Computed from Defendant's Exhibit No. 11)

Numerous courses which are offered to the white students in the junior and senior high schools are not offered to the Negro students in comparable grades in the various Negro schools (R. 90, 131-132, 215, 201). A full-time guidance counselor was provided for the white students at Fairfield High School and not for the Negro students at Industrial High School (Intervenor's Exhibit 3).

On August 23, 1965, the District Court overruled the objections of the Negro plaintiffs and the United States and approved the amended plan of the board (R. 65). On September 8, 1965, the court formalized its findings and ordered the desegregation of that system pursuant to the amended plan (R. 67-72). On August 20, 1965, the court rejected the objections raised by the Negro plaintiffs and the United States (R. 84). An attempt was

made to show that the inferior condition of the Negro schools should have some effect upon the rate of desegregation and the provisions of the plan, but the district court held this evidence to be irrelevant (R. 169-170).

On October 22, 1965, the United States filed a Notice of Appeal from the order of the district court overruling its objections and approving the plan of the Fairfield Board of Education (R. 73).

During the 1965-66 school year only 31 of 2,273 Negroes attended formerly all-white schools.[14] The Department of Health, Education and Welfare informs intervenors and appellants that a total of 49 Negroes attend white schools during the present school year. None of the system's 1,779 whites attended formerly Negro schools.[15]

IV. *No. 23,274, United States, et al. v. Caddo Parish School Board*

There are approximately 72 schools under the jurisdiction of the board (R. 191) which includes the city of Shreveport and rural areas of the parish. Attending these schools are approximately 55,000 children of whom 24,000 are Negroes (R. 191, 189). The board employs approximately 2,200 teachers (R. 191).

Racial separation within the system was maintained through the use of dual attendance zones (R. 69, 81). No Negro child attended any school in which white children were in attendance; no Negro teacher was employed at any school at which white children were in attendance (R. 74-75, 81, 91-92). Athletic facilities and bus transportation were segregated (R. 107-08, 110-12).

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[14] Affidavit of St. John Barrett attached to Motion to Consolidate and Expedite Appeals filed April 4, 1966.

[15] *Ibid.*

After the decision of the Supreme Court in *Brown* v. *Board of Education*, the board made no effort to end segregation in the schools, being of the opinion that it had no duty or responsibility to do so until, and only to the extent that, it was so ordered by a court of the United States (R. 87-89).

On March 23, 1965, Negro school children and their parents notified the board that they and other Negro children desired to attend the public schools of the Parish without discrimination on the basis of their race (R. 60). The board replied that it had "gone the extra mile" in its efforts to provide the best education for all students, but took no affirmative action to desegregate or honor the request of these Negro children and their parents (R. 62, 73).

On June 14, 1965, the district court found that the school board had operated a compulsory segregated system, enjoined the board from continuing and maintaining a racially segregated school system, and ordered the board to submit a plan to desegregate the schools of the parish (R. 133-36). The court stated that it issued the decree "not willfully or willingly, but because we are compelled by decisions of the Supreme Court . . . [and] . . . the Fifth Circuit . . ." (R. 131). The board submitted a desegregation plan on July 7, 1965 (R. 138-50). Objections were filed July 21, 1965 (R. 158-60) and hearing was held on the objections August 3, 1965 (R. 161 et seq.).

The board first proposed a plan in which students, after being initially assigned on the basis of race, would be permitted to request transfer to the school closest to their residence (R. 141). It was established at the hearing that in many instances this would result in Negro children applying for transfer from one Negro school (the original

assignment) to another Negro school (the school closest to residence) (R. 273-274).

As a result of the hearing, the plan was approved, as modified, and incorporated into an order by the District Court August 3, 1965 (R. 291-98). On August 20, 1965 the district court altered the plan in light of the decision of this Court in *United States* v. *Bossier Parish School Board*, 349 F.2d 1020 (August 17, 1965) (R. 300-04).

The plan as finally approved provides for transfer applications for grades one, two, eleven and twelve during the 1965-66 school year, remaining grades to be covered during the 1966-67 and 1967-68 terms (R. 303-04). All initial school assignments of children entering the first grade and those presently enrolled from prior years, would "be considered adequate" subject only to these transfer provisions (R. 291-95).

The community is to be advised of the plan by publication in a local newspaper advising of the right to request transfers. There are to be no individual notices.

Negro children in the covered grades could apply for transfer to white schools only if they applied within a five-day period extending from August 9, 1965 through August 13, 1965, although prior to issuance of the plan transfer applications were permitted throughout the school year (R. 85, 95, 96). Application forms would not be distributed to all students but would be available from principals on request.

Transfer applications would be granted if in "the best interest of the child" and if applicants met transfer criteria (R. 182, 292-94) such as available space,[16] age of the pupil as compared with ages of pupils already attending

[16] All schools in the Parish are overcrowded (R. 258-59, 281).

the school to which transfer is requested, availability of desired courses of instruction, and an aptitude test (R. 147, 217, 243-48). These criteria are part of "the procedures pertaining to transfers currently in general use by the Caddo Parish School Board" and are incorporated in the plan (R. 292). An interview may be required and if parents fail to attend the transfer application is considered withdrawn (R. 145, 146).

The board specifically refused to obligate itself to provide busing for transfer students to formerly all-white schools although in some cases this would require students to arrange trips of about 19 miles (R. 70, 143, 206).[17]

The board was granted the right to reassign a transfer applicant to a "comparable" school nearer his residence. However, "comparable" is not defined in the plan.

Students moving into the parish are initially assigned according to race to formerly all-white or all-Negro schools (R. 177-78, 295).

The order did not provide for assignment of named plaintiffs to white schools or for desegregation of faculty, extracurricular activities or transportation facilities. Progress reports to the court are not required. A spring preregistration of future first graders "is very important" (R. 95, 94) to administration of the system but the plan is silent regarding its desegregation. The plan does not mention the construction and location of new schools and their effect on desegregation.

During the first year of the plan's operation, only one Negro child of the 24,457 attending public schools in Caddo

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[17] There was testimony that all or nearly all the white children from the rural area of Caddo Parish were bussed into Shreveport from as much as 19 miles away. Rural Negro children were provided with three Negro high schools located at various points about the county closer to their residence than the Shreveport schools (R. 274-75).

Parish (of whom approximately 1,720 are entering first-graders) has been admitted to a formerly white school (R. 78). (See the affidavit of Mr. St. John Barrett attached to motion to consolidate and expedite filed in this Court April 4, 1966).

July 19, 1965, the United States sought leave to intervene as of right as party plaintiff and to file objections to the desegregation plan submitted by the board. At the August 3, 1965 hearing on the plan, the district court denied the motion to intervene (R. 166) on October 4, 1965, the United States filed notice of appeal to this Court from the order denying intervention (R. 305). The panel found that "the motion was timely filed and should have been granted" (Slip Opinion p. 116).

V. ***No. 23,365, United States of America, et al. v. The Bossier Parish School Board***

This is the fourth appeal to this Court involving segregation in the Bossier Parish schools. See *United States* v. *Bossier Parish School Board,* 220 F. Supp. 243 (W.D. La. 1963), aff'd per curiam 336 F.2d 197 (5th Cir. 1964), cert. den. 379 U.S. 1000, an unsuccessful attempt by the United States to sue for desegregation prior to the 1964 Civil Rights Act. See also two prior appeals in the present suit, *sub nom. United States* v. *Bossier Parish School Board,* 349 F.2d 1020 (5th Cir. 1965) (per curiam) and *Bossier Parish School Board* v. *Lemon,* No. 22,675, 5th Cir., January 5, 1967 (not yet reported).

This suit was commenced in December 1964 by a group of Negro servicemen and their families who were assigned to the Barksdale Air Force Base near Bossier City, Louisiana; the United States intervened and brought this appeal.

The present appeal involves the "adequacy," under *Brown v. Board of Education*, 349 U.S. 297, 301, of a court-ordered plan of desegregation (R. Vol. II, 251-258; as amended R. Vol. II, 261-263). (NB The record on this appeal is in two volumes. Volume I consists of the record multilithed for use in 5th Cir. Case No. 22,675, a prior appeal. Volume II is marked as Case No. 23,365 and consists of 281 pages.)

Bossier Parish, which adjoins Caddo Parish in northwest Louisiana, is a rapidly growing area (R. II-40) which embraces both urban (Bossier City) and rural areas and several large federal installations, including the Barksdale Air Force Base. Its Superintendent of Schools described the system as the most federally impacted system of its size in the South (R. II-38). The Superintendent also described the areas as a "hard core segregation area" where people have "strong and fixed opinions in opposition to integration," and said in March 1965 that "Bossier Parish is not ready for integration" (R. I-56).[18]

The school system had (in the spring of 1965) 15,267 students, including 10,894 white pupils and 4,375 Negroes,

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[18] The quoted remarks are from a written answer to an interrogatory inquiring what obstacles there were to complete desegregation in the 1965-66 term (R. Vol. I, 40). The Superintendent responded (R. Vol. I, 56) with the following:

> Bossier Parish, Louisiana can properly be termed a "hard core" segregation area. The people in Bossier Parish have strong and fixed opinions in opposition to integration. People here feel that negroes in Bossier Parish are treated fairly and with justice and there has been an unusual degree of racial harmony. Indeed, from the negroes in Bossier Parish there has been no desire expressed for integration of the races other than that which come from Barksdale Air Force Base; that is, from non-Bossier Parish negroes.
>
> In contrast to some other areas of the South which have maintained segregated school systems, Bossier Parish is not ready for integration.
>
> /s/ EMMETT COPE
>
> EMMETT COPE, Individually and on behalf of the Bossier Parish School Board

in 23 school buildings (R. Vol. I, 45-46). There were 17 all-white and 6 all-Negro schools (*Ibid.*). About 1,100 students live on the Barksdale Air Force Base, and approximately 4,400 students are "federally connected" (R. Vol. II. 36). The student population has a large turnover which includes an average of 1,000 to 1,500 newcomers each year, largely due to the federal installations and related industries (R. Vol. II. 38). The system received more than $1,860,000 for school construction from the Federal Government between 1951 and 1964 (R. Vol. I. 104), and also received substantial annual amounts of federal funds for maintenance and operation of the schools, including more than half a million dollars in November 1964 (R. Vol. I. 108).

There was no desegregation of the Bossier schools until September 1965 when twenty-five (25) Negroes were admitted to six previously all-white schools (R. Vol. II. 266). Until 1965, the schools were completely segregated with a system of dual school zones for Negroes and whites (R. Vol. II. 43-45). The 700 teachers in the system were also assigned on the basis of race (R. Vol. II. 175, 179). In school taxation district 13, the urban area, all Negro children, regardless of residence, were assigned to either Butler School (grades 1-6) or Mitchell School (grades 7-12) (R. Vol. I. 45-46; Vol. II. 160). White pupils in district 13 were assigned to elementary, junior high or high schools on the basis of geographic attendance areas reflected on maps which were revised annually to adjust to changing conditions (R. Vol. II, 44, 67-69, 159-161, 168). Similarly, there were dual zones in the rural areas, all pupils having been assigned on a dual zone racial basis (R. Vol. II. 127, 130). Under the segregated system pupils were placed in schools by assignment and not by choice (R. Vol. II. 130). The board also maintained separate

school buses, and bus route maps for Negroes and whites (R. Vol. II. 244-245).

After the trial judge in April 1965 ordered the board to submit a desegregation plan, the board appealed that order[19] but, as there was no stay in effect, submitted three alternative proposals for desegregation (R. Vol. II. 1-12). None of the proposals involved a start of desegregation until 1966, and the proposed completion dates ranged from 1970-71 (the board's first choice) to 1968-69. We omit any detailed description of the board's proposed plan, except to state that under the proposal all prior initial assignments—all of which were segregated—were "considered adequate", subject to a pupil's right to transfer to "the nearest formerly all-white or all-colored school" (R. II. 4). Although the plan was labeled as one considering both "freedom of choice" and "proximity" by the superintendent (R. Vol. II. 92), all Negro first graders were directed to register at the all-Negro Butler School and white children were directed to the white schools. The superintendent sought to justify this by his assumptions that the majority of Negroes would want to go to Butler, and that they would get better registration advice from teachers of their own race (R. Vol. II. 124-125). The private plaintiffs and the United States filed objections to the plan (R. Vol. II. 13-15, 30-33), and a hearing was held on July 28, 1965.

On July 28, 1965, the District Court entered an order requiring desegregation in September 1965, in grades 1 and 12 (R. Vol. II, 251-258). The United States promptly appealed (R. Vol. II, 258), and this Court within a few weeks vacated the judgment and remanded for reconsideration (R. Vol.

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[19] This court rejected the board's arguments on appeal calling them a "bizarre excuse" for segregation. *Bossier Parish School Board* v. *Lemon*, No. 22,675, 5th Cir., January 5, 1967. Undaunted, the board promptly filed a rehearing petition, still resisting the order to desegregate in January 1967. Rehearing was denied February 6, 1967.

II, 260; see 349 F.2d 1020). The plan was then amended by the trial judge to permit desegregation in two additional grades in 1965 (R. Vol. II, 261-263). There were no other changes in the plan, and the United States then brought this appeal, in which the private plaintiffs were permitted to intervene.

The Court Ordered Plan, as Amended
(R. Vol. II, 251-258, 261-263)

1. *Rate of desegregation.*

The plan, as amended, provides for desegregation in three years, as follows:

School Year	*Grades Desegregated*
1965-66	1, 2, 11, 12
1966-67	1, 2, 3, 4, 9, 10, 11, 12
1967-68	All Grades

The plan also provided that all pupils newly entering the school system would be eligible for desegregation in 1965 without regard to their grades (R. Vol. II, 255).

2. *Method of assignment.*

a. *1965-66 school year.* Initial assignments, already made on a completely segregated dual racial zone basis were "considered adequate" subject to certain transfer rights (R. Vol. II, 251). Transfer provisions for the various grades affected were as follows:

Grade 1—Notice to be published in newspaper for three days advising that applications to first grade in any school could be made by applying in person at school board office during four day period (R. Vol. II, 252-25). As implemented, the board ran a notice of this provision for "Any Negro child . . . who desires to attend a formerly all-white

school" to apply in person at the school board office in Benton, Louisiana accompanied by his parents or guardian (R. Vol. II, 271).

Grades 2 and 11—The procedure prescribed in the order was similar to that for grade 1. The board's newspaper notice, said that "Any Negro child . . . who desires to attend a formerly all white school, will report . . . in person, accompanied by his or her parents or guardian to the School Board office at Benton, Louisiana." A three-day period was prescribed (R. Vol. II, 273).

Grade 12—The order provided that all 12th grade students, regardless of race, were to be mailed notices advising of the right to transfer to any school by applying in person, accompanied by parents, during a four day period (R. Vol. II, 252). The notice actually mailed to pupils (R. Vol. II, 269) said that pupils could apply for a transfer, but it contained no statement indicating that pupils would be accepted in any school regardless of race, or that grade 12 was desegregated, or any similar explanation (R. Vol. II, 269-270).

The court order did not grant an unconditional right of free choice. Rather, it provided that requested "transfers or assignments . . . shall not be unreasonably denied" (R. Vol. II, 253). It listed certain criteria to be applied in granting or denying requests, including desire of pupils and parents, availability of space and other facilities in the school to which transfer or assignment is requested, age of the pupil as compared with ages of pupils already attending the school, and availability of requested courses of study (R. Vol. II, 253-254). The order also provided that the board may "if it deems it advisable" assign a pupil to "another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence" (R. Vol. II, 254). All pupils

whose requests were denied were to get a notice setting forth specific reasons (R. Vol. II, 255).

b. *School years subsequent to 1965-66.* Only very general provision was made in the order with respect to the method of assignment in future years. The order provides only that "initial assignments . . . shall be made purely and simply on the basis of individual choice, reserving to all pupils, however, the right to apply for transfer in accordance with the procedures hereinabove established, and reserving to the School Board . . . the right to place a pupil in a comparable school other than the school of his choice . . . closer to the pupil's residence" (R. Vol. II, 256). The order also provides that "Dual school districts on racial lines shall be abolished".

Because these provisions are so general, a variety of things are unclear. The plan does not state (1) whether school attendance lines and the feeder system will be used in some manner in the future; (2) whether once assigned to a school, pupils will be required to make an annual choice of schools or will remain where they previously were assigned unless they seek transfers; (3) what will be done if pupils indicate no preference; (4) whether pupils already attending a school will have priority over others choosing a school in the event of overcrowding; (5) or any definition of the "comparable school" discretion given to the school board.

3. *Notice and related procedures.*

The procedures ordered and utilized for the 1965-66 term were set forth in the discussion above. The order gives no details with respect to the procedures in other years except the general statement that the assignments will be "subject to all reasonable procedural requirements

that may be adopted and promulgated by" the school board (R. Vol. II, 257). This leaves unclear, for example, whether the choice and transfer procedures will be only for Negroes and not for whites as they were in grades 1, 2 and 11 in 1965; whether there will be individual notices or only newspaper advertisements; and whether the school board may adopt its proposal of having all Negroes register at Negro schools and all whites at white schools. Other unresolved issues related to the content of notices, the time for transfer, whether pupils and parents must appear in person at the school board office, etc. The plan deals with none of these matters.

4. *Transporation.*

The plan makes no mention of transportation facilities. In a somewhat confusing colloquy between the superintendent and the Court, during trial, the superintendent may have indicated an intention to desegregate buses (R. Vol. II, 101-102). The extent, if any, by which the prior pattern of segregated buses, and bus routes for Negroes and whites is to be changed is unclear.

5. *Faculty and staff desegregation.*

The plan makes no mention of faculty desegregation. The school authorities made clear that they had no plans to end the system of assigning faculties on a racial basis (R. Vol. II, 179-180). The faculty turnover rate was about 9.2% annually (R. Vol. II, 176).

6. *School connected activities, extra-curricular activities, etc.*

The plan contains no provision with respect to these matters.

7. *New construction.*

The plan makes no reference to planning new facilities or additions so as to eliminate segregation. At least two new buildings had been built and opened on a segregated basis during the three years superintendent Cope had been in office (R. Vol. II, 80).

8. *Unequal Negro school facilities.*

The plan makes no provision for steps to equalize educational opportunities for Negroes in the parish.

The schools operated for white and Negro children in Bossier Parish show considerable disparity in a number of qualitative aspects. The white high school (Bossier) for one district offers 53½ courses over a four year period, including two years of Latin, two years of French, two years of Spanish, and three years of art (R. Vol. II, 184-185). However, the Negro high school (Stikes) for the same district offers only 28 courses, and offers no Latin, French, or Spanish (R. Vol. II, 186). Another district's white high school (Airline) offers 43.5 courses, while the Negro high school (Mitchell) offers 30.5 (R. Vol. II, 189). Similarly, the white high school (Haughton) for a third district offers 40.5 courses, while the Negro high school (Princeton) offers 34 (R. Vol. II, 192). The Superintendent stated that the criterion for offering a course was:

> if a course is requested on the senior high level by as many as ten students we attempt to offer that course in that particular school. Yet, at the same time, there are other factors where maybe ten students have not applied as far as conditions are concerned in the other schools and I think that situation has to be taken into consideration (R. Vol. II, 109).

Disparities are found in other respects in addition to the number of course offerings. While there are two full time guidance counselors at Airline (white), there are none at Mitchell (Negro) (R. Vol. II, 190). In fact, while there generally are guidance counselors at the schools for whites in the parish, there are none at any of the Negro schools (R. Vol. II, 187, 194). At the Princeton school (Negro), there are 3.8 volumes of "approved books in good condition" per pupil, while at Haughton (white) in the same district there are 6.3 per pupil (R. Vol. II, 190-191).

Mr. William Stormer, of the United States Office of Education, Department of Health, Education, and Welfare, an expert in the evaluation of the quality of school plants, testified on his inspection of the Bossier Parish schools in the summer of 1965 (R. Vol. II, 195-198). Using the Lynn-McCormick Rating System which combines a number of weighted ratings to allow numerical comparisons between schools, he determined that the highest white school (Airline) ranked at 82 on the scale, while the highest Negro school (Mitchell) ranked at 16 (R. Vol. II, 199, 202). Fifteen of the seventeen white schools rated above the top Negro building (R. Vol. II, 202). When challenged upon cross-examination that there was really no dramatic difference between the Negro and white schools, he responded: "Yes, there is. I beg your pardon. For example, the wooden structures used at Stikes for what I presume to be elementary classrooms . . . there are no wooden structures at Curtis" (R. Vol. II, 209). Similarly, the structures used for elementary grades at Irion (Negro) are wooden, while those used for the same purpose at Benton (white) are not (R. Vol. II, 209). The home economics facilities at Stikes high school (Negro) are in a wooden frame two story structure, whereas similar facilities at Bossier high school (white) are in a modern main building (R. Vol. II, 200).

All of the Negro schools must use their gymnasiums as auditoriums, while Airline, Bossier, Benton, and Haughton schools which are all white have separate auditorium facilities (R. Vol. II, 200-201). The gymnasium floors in all of the Negro high schools are constructed of cement or asphalt tile surface, compared to wooden floors in all of the white high schools (R. Vol. II, 200).

9. *Periodic compliance reports.*

The plan makes no provision for periodic compliance reports to indicate the extent of desegregation under the plan. However, in September 1965, the board voluntarily filed a report indicating that 25 Negroes had been admitted into six formerly white schools (R. Vol. II, 266-267). No subsequent reports have been made.

VI. *No. 23,116, Davis v. East Baton Rouge Parish School Board*

The East Baton Rouge Parish school system includes the City of Baton Rouge, Louisiana's state capital, as well as rural areas in the parish. The system, in 1965, had 87 schools housing 54,894 pupils (R. 70) and about 2,300 teachers (R. 123). About 60% of the pupils and teachers were white and 40% were Negroes.[20] There were 33 all-Negro schools, 50 all-white schools, and 4 predominantly white schools attended by a few Negroes (R. 49-50, 93). Although this school desegregation litigation was commenced in 1956, the parish schools remained completely segregated until the court ordered a twelve year desegregation plan to begin in the 1963-64 term. The early litigation is described briefly in the note below.[21]

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[20] There were 33,186 white pupils and 21,708 Negro pupils (R. 70-71).

[21] The board was enjoined on May 25, 1960, and ordered to desegregate with deliberate speed. This Court affirmed. *East Baton Rouge Parish*

In 1963, twenty-eight Negroes (of 38 applicants) were admitted to white schools at the 12th grade level (R. 93-94). In 1964, sixty-one Negroes (of 99 applicants) were admitted to white schools in the 11th and 12th grades (R. 99-100). Only four of the fifty-four white schools were desegregated (R. 93). No white pupils sought transfer to all-Negro schools (R. 61). No figures for 1965 appear of record, but apparently, about 130 Negroes were admitted to white schools in grades 1, 2, 10, 11 and 12 in September 1965.[22]

After the 1963 desegregation plan (R. 4-9; 219 F. Supp. at 885-887) had been in effect two years, the plaintiffs moved for amendment and acceleration of the plan, and made various objections to the manner in which it was administered (R. 11-28). Following a hearing (R. 170-251), the Court ordered the board to present an amended plan in accordance with its directions (R. 158-159, 242-250). An amended plan was presented and approved (R. 161-167). Plaintiffs appealed from the order approving the plan (R. 167).

School Board v. *Davis*, 289 F.2d 380 (5th Cir. 1961), cert. den. 368 U.S. 831 (1961). On January 22, 1962, no steps to implement desegregation having been taken by the board, plaintiffs sought further relief in the trial court. In March 1963, Judge West, expressing his disagreement with the *Brown* decision, nevertheless "reluctantly" ordered the school board to file a desegregation plan. *Davis* v. *East Baton Rouge Parish School Board*, 214 F. Supp. 624, 625, 626 (E.D. La. 1963). The board filed a plan to begin in 1964 and desegregate one grade a year for 12 years; the Court ordered desegregation to begin in 1963 under a grade-a-year plan. *Davis* v. *East Baton Rouge Parish School Board*, 219 F. Supp. 876 (E.D. La. 1963).

[22] This estimate is extrapolated from the School Board's original brief on this appeal where it is stated that a total of 219 Negroes were admitted to white schools in the three year period. (Brief of Appellees, pp. 6-7.) The record reflects that in the spring of 1965, before the plan was amended by court order, 89 Negroes (of 103 applicants) were accepted in white schools in grades 10, 11 and 12 (R. 107).

A. The 1965 Plan

1. *Rate of desegregation.*

The 1965 plan provided that desegregation be extended to all grades by September 1968 according to the following schedule (R. 162):

School Year	*Grades Desegregated*
1963-64 (under 1963 plan)	12
1964-65 (under 1963 plan)	11, 12
1965-66	1, 2, 10, 11, 12
1966-67	1, 2, 3, 4, 10, 11, 12
1967-68	1, 2, 3, 4, 5, 6, 7, 10, 11, 12
1968-69	all grades

Thus, under the plan one grade was desegregated in each of the first two years, 3 additional grades the third year, two grades the fourth year, three grades the fifth year, and two grades the sixth year of operation.

2. *Method of assignment.*

The plan provides that as additional grades were covered by the plan "new districts will be prepared providing the students living within the boundaries of such districts a choice of school to attend on a first come-first served basis without regard to race or color (R. 163). The plan also provides that students will be accepted "at any of the schools within their respective district" until such school is "filled," and that excess registrants shall be sent to the other school or schools in their district for registration (R. 164). It provides that no student shall be denied admission because of race (R. 184).

These provisions must be understood in the context of the board's practices and procedures. The board has maintained 100 school districts or geographic attendance areas

(R. 103). About 70% of the districts contained residences of both races (R. 103), and segregation was maintained by a dual system of attendance districts, with separate overlapping districts and maps for Negroes and whites (R. 74-76, 79-80). Elementary schools were designated as "feeder schools" for designated secondary schools, also on a segregated basis (R. 77, 84-85, 105). This method continues in effect in all grades not yet "desegregated" under the plan's schedule. In those grades which are nominally desegregated, the Negro and white zones are combined into multiple-school districts, so that each zone contains one or more white and one or more Negro schools. Pupils are allowed to choose either the white school or the Negro school in their geographic attendance district (R. 76-78, 83-84). If a pupil fails to make a choice, he remains in the segregated school where he was previously assigned under the pre-existing arrangement (R. 209). The plan makes no mention of abolishing the segregated "feeder system" which moves students on a racial basis if they express no choices.

3. *Notice and related procedure.*

The plan provides that principals and teachers be notified of the attendance districts and that the districts be advertised in the local news media. A registration day is also to be advertised for at least 30 days (R. 163). The superintendent is authorized to use a better method if he can devise one (R. 163-164). There is no provision for individual written notice to pupils or parents. The plan does not specify the content of the public announcements beyond stating that the boundaries and registration date will be advertised.

Similar procedures had been used under the 1963 plan (R. 92-93, 98, 107), in disregard of the court's prior order

that all pupils be given individual mailed notices of their transfer rights (R. 5).

4. *Transportation of pupils.*

The school system operates 250 buses which transport more than 25% of the pupils to school (R. 128-129). The plan provides that transportation will be furnished or not furnished in accordance with state laws and policies without regard to race (R. 164). The plan makes no reference to desegregation of buses or bus routes.

Students are segregated by race on the buses (R. 129). This policy was applied to the Negro pupils admitted to formerly white schools (R. 129, 211). The superintendent was questioned about this (R. 211):

> Q. Would you agree that the way it has been operating in the past is that Negro children when assigned to desegregated schools are still being taken to and from the school in segregated buses? A. Yes.
>
> Q. And my question is: Is there any reason why you would change that, beginning with this Fall and, if not, why not? A. I just have not thought about it.

Judge West sustained objections to questions about desegregating the buses ruling: "We are not interested in the School Bus situation right now" (R. 213).

5. *Faculty and staff segregation.*

The plan makes no provision for faculty desegregation. Judge West denied relief on the faculty issue (R. 246).

All faculties were completely segregated on the basis of race (R. 124-125). Negro supervisory personnel assigned to the central administration were segregated in a separate building (R. 125-126, 226-227). Teachers are assigned to

specific schools by the administration (R. 202). About 13 or 14 percent of the teachers are replaced each year in the regular turnover of personnel (R. 147-148).

6. *School connected activities, extra-curricular activities, etc.*

The plan makes no provision with respect to equal access to school connected activities, etc. without regard to race.

7. *New construction.*

The plan makes no reference to planning new facilities or additions to facilities so as to eliminate segregation.

At the time the trial was held, the school board was planning 17 new school buildings in the next five years (R. 130). The school system also made extensive use of temporary classroom building or "T-Buildings" (R. 53, 69). Plaintiffs proffered, but the court refused to consider, testimony of an expert witness, a school administration expert, that certain temporary buildings were arranged so as to preserve segregation. For example, temporary rooms were added to Negro schools while nearby white schools had vacant spaces (R. 267-271).

B. Aspects of the 1963 Plan

The 1963 plan expressly permitted the board to continue to make initial assignments on a racial basis (R. 5). As noted above, the board modified its dual zone procedure so that some Negro pupils were permitted to transfer out of segregated schools to the white schools in their areas. This transfer right was subject to a screening process in which Negro pupils were measured by a variety of criteria which had not been applied to white students attending the schools (R. 6-7). Ten Negro applicants were

rejected in 1963 and 38 were rejected in 1964 by application of these criteria. As an example, one Negro was refused admission to a white school on the ground that he was "nervous" (R. 110). In 1965 the court ruled that the screening criteria could no longer be used (R. 249).

C. Exclusion of Evidence on Adequacy of the Plan

The trial court refused to permit an expert witness, called by the plaintiffs, to be sworn or to testify on the sole ground that the witness was from Massachusetts. The court said: "I don't want someone from Massachusetts coming down to tell the Baton Rouge school board how to run their schools" (R. 228). The witness, Dr. Donald P. Mitchell, was experienced in educational administration and in making school surveys (R. 252-258). He is Executive Director of the New England School Development Council and a member of the Harvard University faculty (R. 261-262). The Court stated that Dr. Mitchell's testimony could be proffered by deposition and filed, but that the Court would not consider it (R. 228, 231).

Dr. Mitchell's deposition was taken and appears in the record at R. 251-287. He testified that the system "is still a segregated system that has slight deviations from that overall pattern" (R. 262); that the "procedures for initial pupil assignment, regardless of grade level, are definitely ones which separate the races" (R. 262); that the transportation was segregated (R. 263); that teachers and supervisors were segregated (R. 263). He said of the plan that "on the results of the last two years and this year approaching, unless the approach is changed, only a token result will come forth" (R. 266). He described the overlapping segregated bus routes as "a prohibitive operation" causing the taxpayers "quite a load" (R. 272-273). He regarded the freedom of choice plan as "a bankruptcy deci-

sion on the part of a local district" and said that the board's earlier policy of having geographic zones "made sense from an administrative point of view" (R. 273-274). He concluded that "The idea that the freedom of choice is democratic is completely hypocrisy because it only applies to the Negro students" (R. 275).

SUPREME COURT, U. S.
FILED
AUG 4 1967
JOHN F. DAVIS, CLERK

Nos. 256 and 301

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Caddo Parish School Board, et al., Petitioners

v.

United States of America, et al.

The Board of Education of the City
of Bessemer, et al., Petitioners

v.

United States of America, et al.

SUPPLEMENTAL APPENDIX

To Petitions for Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit

(Consisting of Dissenting Opinion Below of
Circuit Judge Godbold
Filed on June 27, 1967)

REID B. BARNES
WILLIAM G. SOMERVILLE, JR.
MAURICE F. BISHOP
JOHN C. SATTERFIELD
FRED L. JACKSON

ALBIN P. LASSITER
LOUIS H. PADGETT, JR.
JACK P. F. GREMILLION
WILLIAM P, SCHULER
JOHN A. RICHARDSON

Counsel for Petitioners

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23345

UNITED STATES OF AMERICA and LINDA STOUT, by her father and next friend, BLEVIN STOUT,

Appellants,

versus

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.,

Appellees.

No. 23331

UNITED STATES OF AMERICA,

Appellant,

versus

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL.,

Appellees.

No. 23335

UNITED STATES OF AMERICA,
Appellant,
versus
THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Alabama.

No. 23274

UNITED STATES OF AMERICA,
Appellant,
versus
CADDO PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23365

UNITED STATES OF AMERICA,
Appellant,
versus
THE BOSSIER PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23173

MARGARET M. JOHNSON, ET AL.,
Appellees.

versus

JACKSON PARISH SCHOOL BOARD, ET AL.,
Appellees.

No. 23192

YVORNIA DECAROL BANKS, ET AL.,
Appellants,

versus

CLAIBORNE PARISH SCHOOL BOARD, ET AL.,
Appellants,

No. 23253

JIMMY ANDREWS, ET AL.,
Appellants,

versus

CITY OF MONROE, LOUISIANA, ET AL.,
Appellees.

Appeals from the United States District Court for the Western District of Louisiana.

No. 23116

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Appellants,

versus

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING EN BANC

(June 27, 1967.)

GODBOLD, Circuit Judge, DISSENTING:

I recognize and oppose the inequities of state-enforced and state-encouraged racial discrimination in the operation of public schools. I respect the energy, labor and intellect that judges of this and other courts have given in the past twelve years toward solution of such inequities. I understand, and share, the desire to chart a future course having fewer difficulties and frustrations. Nevertheless, although the decrees appealed from must be reversed, I dissent from the opinion and the decree.

Because this dissent is late-filed and numerous points have been discussed in the other dissenting opinions, I shall limit this opinion to only a few of the grounds on which the majority opinions, in my

view, are both incorrect constitutionally and inappropriate as a matter of judicial administration.

I

In the critical area of student assignment the majority propose an unconstitutional condition on the operation of a valid freedom of choice system, violative of equal protection and of due process. This court has deemed freedom of choice[1] an acceptable method for a school board to use in fulfilling its duties. *Singleton II*, 355 F.2d at 871. HEW recognizes it as a permissible means of desegregation. 1966 Revised Guidelines, Subpart B, 181.11; also Subpart D. A substantial part of the majority opinions and the attached decree are directed at setting out requirements of a free choice plan that is truly free and unfettered. But the majority superimpose upon free choice, even though in all respects fairly and validly set up and administered, a condition subsequent that the statistical results of racial mixing[2] produced by the freely-made choices must be acceptable under standards imposed from outside those making the choice. They do this by establishing as a constitutional requisite that a free choice system must produce a degree of student racial mixing, not yet defined as to limits but nevertheless required.

[1] Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

[2] The term "racial mixing" is used with intent that it be neither laudatory nor denigrating of the process and the individuals involved, but as a simple descriptive phrase that avoids further confusing use of "integration" and "desegregation."

The United States reads the language of the majority in this vital area as mere dictum. In brief on rehearing the government says: "The appellees, in petitioning for rehearing, asserted that the decision of the panel held that the Constitution imposes an absolute duty to achieve a racial mixing of students so as to eliminate a disproportionate concentration of Negroes in certain schools within a system. Once this proposition is asserted, the appellees have no difficulty in disparaging the opinion as being inconsistent with prior holdings of the Fifth Circuit. It is true that the panel indicated its concern that educational opportunities on an equal basis be furnished to all, and the opinion does suggest in a footnote that elimination of the all-Negro school makes this objective easier to obtain. *But the appellees misread the opinion when they claim that this is the holding of the Court.*" I wish that I could read the majority as saying no more than that disproportionate racial concentration of students is evidentiary of whether a freedom of choice system is truly free, or share with confidence the view that the teeth of the original opinion are extracted by paragraph 5 of the en banc opinion. I am not able to do so. If the language of mandatory mixing is indeed a mere aside we shall all await with interest to see whether the courts are the prisoners of their own slogans and the dictum of today is to be asserted as the law of tomorrow.

The majority define "integration" and "desegregation" as conversion of a de jure segregated dual school system to a unitary, nonracial (nondiscrimina-

tory) system—students, faculty, staff, facilities, programs, and activities, this for the objective of offering equal educational opportunities for all.[3] There are two strings to the bow of this definiton. To convert a dual system into a unitary, non-racial system the student body is one of the arms of the system which must be converted. Second, the equal educational opportunity that must be offered is elsewhere in the opinion equated with a racially mixed education.

The majority state firmly that the law does not require racial balance, or a "maximum of racial mixing", nor that each and every child shall attend a racially-balanced school,[4] and that Guidelines are not to be used to establish racial "quotas." Percentage figures in the Guidelines may be rules of thumb as the majority say. It may develop that neither the courts nor the Commissioner of Education will seek to achieve racial balance by the Guidelines or otherwise. But all this is irrelevant to the constitutional issue. Grasping the irrelevancy requires understanding that "racial balance" is a word of art referring to a ratio of Negro and white students in approximately the same proportions as Negro and white population of the community or of the schools. It is proposed that governmental action must produce a degree of racial mixing less than "racial balance" but, by someone's standards, sufficiently mixed to produce "equal educational opportunity," even though free choices by students and their parents have pro-

[3] Footnote 5.
[4] Footnote 5.

duced a contrary or lesser result.[5] Despite disclaimers of specific figures and of racial balance, power to require mixing is reserved within a range, a hazy range to be sure but nevertheless existent.[6] If the Commissioner and the courts constitutionally have no power to require racial mixing superimposed on a valid free choice system, constitutionality is not conferred by the premise that they will not employ the power to the extent of "racial balance" but are free to roam at will in requiring mixing to a lesser extent.[7]

---

[5] For example:

p. ....: "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegrated schools and achieved substantial integration?"

p. ....: "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities."

En Banc Opinion p. ....: "In fulfilling this [affirmative] duty it is not enough for school authorities to offer Negro children the opportunity to attend previously all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities and activities, as well as students."

Other language is somewhat less mandatory in terms, as statements that mixing of students is a high priority goal and that disproportionate concentrations of Negroes cannot be ignored. But when the opinion is carefully read racial mixing is not set out as a desirable objective but as a constitutionally required result.

[6] Perhaps the range is "substantial integration" as used by the Civil Rights Commission. See n. 5 of majority opinion.

[7] Significant testimony from HEW officials was given in *Alabama NAACP State Conference of Branches et al and United States of America v. Lurleen Burns Wallace, Governor, and John*

The theory that under a free choice plan statistical imbalance alone rises to constitutional dimensions was discarded by the Eighth Circuit in *Clark v. Board of Education of Little Rock*, 369 F.2d 661, 666 (8th Cir., 1966).[8] See also *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 62 (6th Cir. 1966):

> "[T]he mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.

* * *

W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II as United States Commissioner of Education, Case No. 2457-N, decided by a three-judge court on May 3, 1967 (Middle District of Alabama).

As I read that testimony HEW considers it unlikely that a fairly operated free choice plan will fail to produce transfers in numbers that it deems sufficient. But that under §181.54 of the 1966 Guidelines the best indicator of whether the plan is working is the extent of transfers from segregated schools. That a low rate of, or lack of, transfers may lead to an administrative examination of operation of the plan, which might result in a determination that the plan is not being properly operated. That §181.11 authorizes the Commissioner to determine the conditions under which a free choice plan is not acceptable.

There is other HEW testimony that if a school system employed a free choice plan, administered in a non-discriminatory manner in every respect, and no Negro chose transfer to a white school and no white student chose transfer to a Negro school, there would be a "technical violation" of the 1966 Guidelines and the system regarded as not in compliance. (Whether this is likely to occur is not the question. We are concerned with the scope of power, not the withholding of exercise of it.)

[8] "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their class rooms. We find no unlawful discrimination in the giving of students a

"[B]are statistical imbalance alone is not forbidden.

* * *

"Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools."

That school desegregation cases are class actions does not add any validity to the idea of a required mixing result.[9] It may be that "[T]he right of the individual *plaintiffs* must yield to the right of Negroes as a class."[10] But the majority do not stop

free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself."

* * *

"In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

[9] I do not comment in detail on the majority's proposition that cases having to do with procedures for enforcement of rights and the exhaustion of administrative remedies are now to be treated as substantively creating class rights to constitutional entitlements previously considered to be valued rights of individuals. Instead I deal primarily with the additional question of whether the alleged class right can override or swallow up individual right to equal protection. "It is the individual who is entitled to the equal protection of the laws." *McCabe v. Atchison, etc.*, 235 U.S. 151, 161, 35 S.Ct. 69, 59 L.Ed. 169 (1914).

[10] The class is defined as all Negroes in a school district attending an inherently unequal school. If equal educational opportunity includes the right to a racially-mixed education with mandatory mixing if not otherwise attained, it is not clear why the class stops at district lines. Stopping at the line is a convenient device for administration and for procedural purposes in litigation but wholly irrelevant to the quantum of constitutional entitlements.

there. They create the rule that the freely-exercised choice of *all* individual members of the class must yield to the "right" of the class if exercise of choice has not produced a result agreeable to the standard of a supervising authority (judicial or administrative). But "[t]here is nothing in the Constitution which prevents his [everyone's] voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." *Bradley v. School Board of City of Richmond,* 345 F.2d 310, 316 (4th Cir., 1965). See also, *Olson v. Board of Education,* 250 F.Supp. 1000, 1006 (E.D. N.Y.), appeal dismissed as moot, 367 F.2d 565 (2d Cir., 1966): "[N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."

It is asserted that freedom of choice is a privilege or means not itself reaching constitutional dimensions, as though this is an answer to whether once conferred the exercise of it may be aside. The concern is not merely whether individual privilege must give way to an overriding constitutional right, but whether individual privilege conferred upon the beneficiaries of the right as an acceptable means of meeting the constitutional requirement, and validly exercised, must give way. Exercised free choice is a bene-

fit, and student and parents may not be deprived of that benefit on racial grounds.

Once exercised the choice is one of associates. The constitutional depths of freedom to select associates are not yet fully explored.[11] "No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitations on such a fundamental freedom must be brought within the scope of constitutional safeguards." Emerson, Freedom of Association and Freedom of Expression, 74 *Yale L.J.* 1 (1964). Professor Emerson points out that associational rights are not derived solely from the first amendment but are implied in the whole constitutional framework for the protection of individual liberty in a free society. The right of freedom of association most frequently comes up in the context of the power of government to regulate the affairs of a group or association, *NAACP ex rel Alabama v. Patterson,* 357 U.S. 449, ... S.Ct. ...., ... L.Ed. .... (1958), but arises also in other contexts, includ-

[11] See Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 *Har. L. Rev.* 1, 33 (1959), referred to by the majority. "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . . ."

And at 73 *Har. L. Rev.* 34: "[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimensions . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"

ing the area where the associational rights are not organizational but personal in nature. It is this context which *Wechsler, supra,* believed was the primary, but overlooked, issue in the early school segregation cases. And Professor Emerson notes, "[I]n this situation—an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right untouchable by government power."

The collision is head-on between individual freedom and paternalistic authoritarianism. No more invidious discrimination, or improper government objective, can be imagined than national power setting aside the valid exercise of choice by members of a class in the name of the constitutional objeotive for which the choice was granted to the class in the first place.

The cut horizontally and vertically into American life of what the majority postulate is breathtaking. There are many means by which the Negro is moving out of established patterns of segregation and entering the full current of American life. To meet the constitutional objective of juries not racially discriminatory acceptable machinery must be established to place on the jury rolls Negroes qualified for jury service. *Brooks v. Beto,* 366 F.2d 1 (5th Cir., 1966). In the name of the standard are Negroes (and whites too) constitutionally forbidden to exercise excuses or avail themselves of other means valid and accepta-

ble to them of avoiding actual service?[11a] Whether Negroes are entitled to move, and wish to move, from the back of the bus is one thing; whether the power of the state is to be employed to require them to move is another. We need not speculate on the mathematical probabilities of what the exercise of choices may produce in any of these areas of life (though there is implicit in the majority position the feeling that under a valid free choice system not enough Negroes will make the choice to produce the defined goal of equal educational opportunity.) The constitutional problem is not founded in probability but power and duty of governmental authority to act regardless of probability.[12]

[11a] In a criminal case against a Negro defendant the exercise by the white prosecutor of peremptory challenges so as to strike Negro jurors is not in a particular case a violation of equal protection. *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d (1965). If the Negro defendant, by like exercise, removes Negro jurors is his action subject to scrutiny?

[12] Nor would the basic constitutional defect be remedied by an approach along the following line: that choice is exercised annually, and if required standards of mixing are not attained in one year the free choice plan itself might be declared unacceptable for the next year. To deprive of free choice because, on the basis of prior choices, it is feared that a required level of mixing will not be attained in the next year is no less invidious than retrospectively vitiating exercise of choice that did not produce the demanded ratio.

Let it be emphasized that here, as elsewhere, the words "ratio" and "required racial mixture" and words of like import do not necessarily represent a figure exact in a mathematical sense, but the range—whatever it may be—less than the "racial balance" which the majority and HEW say they will not attempt to reach but insufficient to qualify as "equal educational opportunity." It requires no special gift of prophecy to foresee that the range will center on the suggested percentages of the Guidelines.

II

Expressions by this court of the validity and constitutionality of the 1966 Guidelines were wholly inappropriate. Because of the context and manner of that action no one can say with assurance or exactness what has been decided, what is open, and what is subject to re-examination.

Each of the seven cases before us was pending on the docket of this Court before the 1966 Guidelines were promulgated. These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon.

The Guidelines were brought into these cases for a limited purpose. The Court asked counsel to comment by supplemental briefs on the extent to which it is permissible and desirable for the courts to give weight to guidelines, and if permissible and desirable to suggest means to make them judicially effective (Opinion, Footnote 13). From this proper inquiry for comment of counsel on matters of judicial power and policy the majority have vaulted to premature pronouncements of compliance with statutory policy and to unprecedented and almost offhand statements on complex constitutional questions of vital significance to millions of our citizens.

It is a non sequitur that a court is empowered to act on a constitutional question not before it for decision on the ground it feels it should, for no court would ever do so without such feeling. The doctrine of constitutional restraint is not to restrain courts that do not want to act but those that do and to protect them from the very forces and circumstances that engender a sense of urgency, create a compulsion to act and serve to rationalize action after the event.

For reasons whose soundness is beyond argument the doctrine of restraint in passing on constitutional issues is engrained in our jurisprudence. "Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication . . . . only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we have followed." *United States v. Rumely*, 345 U.S. 41, 48, 73 S.Ct. 543, 97 L.Ed. 770, 776-77 (1953).[18] This circuit consistently has recognized and honored the principle. See e.g., *Gibbs v. Blackwell*,

[18] "[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States v. Auto Workers*, 352 U.S. 567, 591, ... S.Ct. ...., ... L.Ed. .... (1957).

"We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity . . . . . Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof." *United States v. Petrillo*, 332 U.S. 1, 5 and 6, ... S.Ct. ...., ... L.Ed. .... (1947).

354 F.2d 469, 471 (5th Cir., 1965); *Conner v. New York Times Co.*, 310 F.2d 133, 135 (5th Cir., 1962).

The Court succumbed to the temptation to reach all issues within its sight and thereby present a total package—complete, neat and with all corners square. Already it was well-established that the Guidelines are of great weight and are minimum standards. If they were to be made judicial standards in a more formal sense they could have become so subject to a determination of their constitutionality and statutory authorization at a proper time and under appropriate judicial procedures.[14] The millions affected by them are entitled to no lesss, nor are the public officials who must administer them, the school officials who must seek to implement them, the citizens who are assisted by them, and the courts who are to give weight to them.

The position of the United States itself exemplified that validity and constitutionality of the Guidelines were never in issue. At p. 56 of its brief for the en banc rehearing the United States said:

> "The appellees' briefs argue at considerable length that the Guidelines violate the Civil Rights Act of 1964. The North Carolina Board of Education, as *amicus curiae*, requests that the Court not consider the ques-

[14] There is no way for a court to properly decide as an abstraction whether the Guidelines are such rules, regulations or orders as do not become effective until approved by the President (as required by §602, Title IV, Civil Rights Act of 1964, 42 U.S.C.A. §2000 d-1). There must be a hearing at which there is evidence on the scope of their application.

tion of the 'validity' of the Guidelines, urging that that question is not here in issue. We agree that that issue is not technically before the Court. But the question of whether the Guidelines are an appropriate guide for effective relief in a Fourteenth Amendment case is before the Court. We believe that they are, and that the Guidelines conform to Fourteenth Amendment standards."

It is especially unfortunate that the en banc court should have discussed validity and constitutionality at a time when there was pending before a three-judge court in the United States District Court for the Middle District of Alabama, *Alabama NAACP State Conference of Branches, et al, and United States of America v. Lurleen Burns Wallace as Governor, et al, and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II, as United States Commissioner of Education,* Civil Action No. 2457-N, which had been tried, briefed, argued and was under submission awaiting decision.

In that case the constitutionality of the 1966 Guidelines had been squarely raised, a record developed,[15] and the application, effect, operation and validity of the 1966 Guidelines litigated at length, including the difficult question of presidential approval.

[15] The parties called 16 witnesses, submitted 40 depositions and filed approximately 800 pages of briefs. A substantial part of all this related to constitutionality of the Guidelines and whether they conformed to the intent of the 1964 Act.

The United States had waived sovereign immunity to the extent of consenting that Secretary of Health, Education and Welfare Gardner and Commissioner Howe be made parties defendant for the purpose of litigating these important questions. Secretary Gardner and Commissioner Howe appeared and admitted jurisdiction.

The mischief of failure to exercise requisite judicial restraint was exemplified when 2457-N was decided on May 3, 1967, for that court considered constitutionality and validity to be already decided by this Court and a decision based on appropriate pleadings, proof and consideration was foreclosed.[16]

[16] "After extensive briefing and full argument, the Court of Appeals for the Fifth Circuit in No. 23,345, *United States v. Jefferson County Board of Education,* decided December 29, 1966, rehearing decided en banc March 29, 1967, has held that the 1966 HEW Guidelines are 'within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964.' (Slip opinion p. 29.) Again the Court said: '* * * we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964.' (Slip opinion p. 9.) On en banc rehearing, the Court reiterated: 'These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution.' (Slip opinion p. 7.)

"These holdings were made deliberately and advisedly in the face of contentions that the validity of the 1966 Guidelines was not in issue. The Court ruled otherwise, holding that the courts should rely heavily upon the Guidelines and should model their standards after those promulgated by the executive (original slip opinion p. 18), and that 'these Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation.' (Slip opinion on en banc rehearing p. 7.)"

In my view the expressions by this Court on both constitutionality and validity were substantively erroneous. But that is immaterial to the matter of how vital questions are properly considered and determined.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 301.

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS.

The purpose of this supplemental brief is to invite to the Court's attention a recent decision of the Sixth Circuit Court of Appeals which was decided after the filing of our petition for certiorari. In that case, **Monroe v. Board of Commissioners, City of Jackson, Tenn.**, Nos. 17118 and 17119 (6th Cir., decided July 21, 1967), the Sixth Circuit criticizes and refuses to follow the decision below of the Fifth Circuit with regard to its newly adopted constitutional standards governing student assignments—which is the principal issue as to which review is sought by our

petition. The **Monroe** opinion is printed as Appendix 1, *infra*. This decision now brings the Sixth Circuit, as well as the Fourth and Eighth Circuits, clearly into conflict with the decision below.

In **Monroe** the Sixth Circuit specifically rejects the view of the Fifth Circuit in **Jefferson County** that the Fourteenth Amendment and this Court's decisions in **Brown v. Board of Education** and its progeny affirmatively require compulsory integration, that the constitutional sufficiency of a desegregation plan depends upon its mathematical results, and that different constitutional duties and principles apply to Southern schools previously having so-called "de jure segregation" than to Northern schools having so-called "de facto segregation." In doing so, the Sixth Circuit reaffirmed the principles previously formulated by it in **Deal v. Cincinnati Board of Education**, 369 F. 2d 55 (6th Cir. 1966), petition for certiorari filed, O. T. 1967, No. 131, and applied them to two school systems in Tennessee which, until the commencement of desegregation suits in 1963, had operated "de jure-segregated" schools. Ironically, the Tennessee school systems involved are located little more than fifty miles from schools in Alabama and Mississippi which are governed by the contrary decision of the Fifth Circuit.

The conflict between **Monroe** and the decision below is indicated in the following excerpts from the Sixth Circuit's opinion. After noting and approving the district court's conclusion that "the Fourteenth Amendment [does] not command compulsory integration of all of the schools",[1] the Sixth Circuit holds that its interpretation of **Brown** in **Deal v. Cincinnati Board of Education**, *supra*, as

[1] The district court's conclusion was based on this Court's opinion in **Goss v. Board of Education of City of Knoxville**, 373 U. S. 683, on **Briggs v. Elliott**, 132 F. Supp 776 (E. D. S. C. 1955), and on previous decisions of the Fifth Circuit which the decision below now overrules. See 244 F. Supp. at 356-58.

"prohibiting only enforced segregation" is applicable equally to a school system which had "de jure-segregated" schools:

> We are at once aware that we were there [in **Deal**] dealing with the Cincinnati schools which had been desegregated long before **Brown**, whereas we consider here Tennessee schools desegregated only after and in obedience to **Brown**. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to **Brown**, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

It then considers and rejects the contrary view of the Fifth Circuit in the decision below:

> We are asked to follow **United States v. Jefferson County Board of Education**, 372 F. (2) 836 (C. A. 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished **Bell v. School City of Gary, Indiana**, 324 F. (2) 209 (C. A. 7, 1963), cert. den. 377 U. S. 924, on the ground that no pre-Brown de jure segregation had existed in the **City of Gary, Indiana**, 372 F. (2) at 873. It would probably find like distinction in our **Tina Deal** decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of **Tina Deal** to the schools of Tennessee. * * * However ugly and evil the biracial school systems appear in contemporary thinking, they were, as **Jefferson**, *supra*, concedes, de jure and were once

> found lawful in **Plessy v. Ferguson,** 163 U. S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by **Brown** would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const., Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

The opinion concludes that:

> [T]o the extent that **United States v. Jefferson County Board of Education,** and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in **Deal,** we respectfully decline to follow them.

The Fourth, Sixth, and Eighth Circuits, together with the Fifth, embrace most of the Southern and Border states, which of course are those principally concerned with the desegregation of school systems operating segregated schools countenanced by state law when **Brown** was decided in 1954. As the Fifth Circuit's majority opinions below acknowledge, there certainly is no basis for application of different constitutional standards and theories of constitutional interpretation to previously "de jure-segregated" schools in the Fifth Circuit than to such schools in the Fourth, Sixth, and Eighth Circuits. Whether the decision below of the Fifth Circuit or the decisions of the Fourth, Sixth, and Eighth Circuits are ultimately determined to be the correct interpretation of the constitutional requirements of **Brown v. Board of Education,** the anomaly of such disparate results should not be permitted to stand. Petitioners therefore respectfully reiterate their suggestion to the Court that the questions raised by their petition and the decision below are of such

far-reaching importance to the implementation of this Court's school desegregation decisions and to uniformity in the framing of constitutional standards by the circuits that their resolution by this Court through a grant of the writ of certiorari is fully warranted.

Respectfully submitted,

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APPENDIX.

Exhibit 1.

Nos. 17,118 and 17,119.

United States Court of Appeals for the Sixth Circuit.

Brenda K. Monroe et al., Plaintiffs-Appellants,

v.

Board of Commissioners, City of Jackson, Tennessee, et al., and County Board of Education, Madison County, Tennessee, et al., Defendants-Appellees.

Appeal from the U. S. District Court for the Western District of Tennessee.

Decided July 21, 1967.

Before: O'Sullivan, Phillips and Peck, Circuit Judges.

O'Sullivan, Circuit Judge. In 1963 a suit was filed by Brenda K. Monroe and others, Negro children and their parents, to bring about the desegregation of the public schools of the City of Jackson and of Madison County, Tennessee.[1]

The District Court required the school authorities to submit plans to accomplish desegregation and ultimately granted the relief sought by approving parts of a submitted plan and ordering other steps to be taken. Separate opinions were written, one involving the City of Jackson schools, reported as **Monroe v. Board of Commissioners of the City of Jackson, Tennessee, et al., 221 F. Supp. 968**

[1] The City of Jackson is located in Madison County and the respective school authorities are the Board of Commissioners of the City of Jackson and the County Board of Education of Madison County.

(W. D. Tenn. E. D. 1963), and the other relating to Madison County Schools, reported in **Monroe v. Board of Commissioners, etc., et al., 229 F. Supp. 580** (W. D. Tenn. E. D. 1964). Appeals to this Court from these cases were dismissed by agreement. Obedient to the above decisions, all grades of the schools involved have been desegregated.

The litigation with which we now deal arises from Motions for Further Relief filed in the District Court by plaintiffs. By these motions, plaintiffs sought to accomplish greater integration of the school children, desegregation of the teaching staffs, and the enjoining of described practices of the school authorities which were alleged to be violative of the District Judge's original decrees and contrary to new developments in the law. The District Judge, again, dealt separately with the city and the county schools in disposing of the Motions for Further Relief. His decision as to the city schools is reported in **Monroe v. Board of Commissioners, City of Jackson, 244 F. Supp. 353** (W. D. Tenn. E. D. July 30, 1965), and as to the county schools in **Monroe v. Board of Education, Madison County, Tennessee, et al. ... F. Supp. ...** (W. D. Tenn. E. D. August 2, 1965). These are the cases before us on this appeal; the plaintiffs are the appellants. These opinions, with the earlier ones reported at 221 F. Supp. 968 and 229 F. Supp. 580, *supra*, set out the facts and we will restate them only where needed to discuss the present contentions of the plaintiffs-appellants.

1) Compulsory Integration.

Appellants argue that the courts must now, by reconsidering the implications of the **Brown v. Board of Education** decisions in 347 U. S. 483 (1954), and 349 U. S. 294 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance

in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion. We have so recently expressed our like view in **Tina Deal et al. v. The Cincinnati Board of Education, 369 F. (2) 55 (CA 6, 1966)**, petition for cert. filed, **35 LW 3394 (U. S. May 5, 1967) (No. 1358)**, that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded, "We read **Brown** as prohibiting only enforced segregation". 369 F. (2) at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before **Brown**, whereas we consider here Tennessee schools desegregated only after and in obedience to **Brown**. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to Brown, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

We are asked to follow **United States v. Jefferson County Board of Education, 372 F. (2) 836 (CA 5, 1966)**, which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished **Bell v. School City of Gary, Indiana, 324 F. (2) 209 (CA 7, 1963), cert. den. 377 U. S. 924**, on the ground that no pre-Brown de jure segregation had existed in the City of Gary, Indiana. 372 F.

(2) at 873. It would probably find like distinction in our **Tina Deal** decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of **Tina Deal** to the schools of Tennessee. In **Mapp v. Board of Education, 373 F. (2) 75, 78 (CA 6, 1967)**, Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in **Deal v. Cincinnati Board of Education, 369 F. (2) 55 (6th Circ. 1966).**"

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as **Jefferson**, *supra*, concedes, de jure and were once found lawful in **Plessy v. Ferguson, 163 U. S. 537 (1896)**, and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by **Brown** would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const., Art. I, Section 9, Clause 3, and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

This is not to say that Tennessee school authorities can dishonestly construct or deliberately contrive a system for the purpose of perpetuating a "maximum amount" of its pre-Brown segregation. **Northcross v. Board of Education of City of Memphis, 33 F. (2) 661, 664 (CA 6, 1964).** But to the extent that **United States v. Jefferson County Board of Education**, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in **Deal**, we respectfully decline to follow them.

2) Gerrymandering.

Appellants assert that while giving surface obedience to the establishment of a unitary zoning system and freedom of choice, the school officials of the City of Jackson had been guilty of "gerrymandering" in order "to preserve a maximum amount of segregation." Were this true, it would be violative of the law. **Northcross v. Board of Education of City of Memphis, 302 F. (2) 818, 823 (CA 6, 1962), cert. den. 370 U. S. 944,** and **Northcross v. Board of Education of City of Memphis, 333 F. (2) 661, 664 (CA 6, 1964).** The District Judge in the instant matter did hold that as to some boundary lines "there appears to be gerrymandering." **Monroe v. Board of Commissioners, City of Jackson, supra, 244 F. Supp. at 361.** As to these instances, he ordered changes in the school zone lines. *Id.* at **361, 362.** But, as to the junior high schools, he concluded,

> "that the proposed junior high school zones proposed by defendants do not amount to gerrymandering." 244 F. Supp. at 362.

Without making our own recitation of the relevant evidence, we express our agreement with the District Judge.

3) Faculty Desegregation.

In the accomplishment of desegregation in the involved schools, there remain some that are attended only by Negro and other only by white children. The teaching staff conforms substantially to this pattern—all Negro teachers in the all Negro schools and all white teachers in the all white schools. Little attention was paid to the teaching staff in the early desegregation cases. **Brown v. Board of Education,** *supra,* did not speak on it, nor did the early relevant decisions from this circuit. In **Mapp v. Board of Education of Chattanooga, 319 F. (2) 571, 576 (CA 6, 1963),** however, we ordered restored to the com-

plaint there involved allegations and prayers for relief relating to assignment of teachers and principals, but ordered also that "decision of the legal question presented await development of the progress of the plan approved." 319 F. (2) at 576. And we further concluded that "within his discretion, the District Judge may determine when, if at all, it becomes necessary to give consideration to the question. . . ." Ibid.

This leisurely postponement of consideration of faculty desegregation appealed to the Fourth Circuit, when in **Bradley v. School Board of City of Richmond, Virginia, 345 F. (2) 310, 320, 321 (CA 4, 1965)**, it said:

> "The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative. When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools. An earlier judicial requirement of general reassignment of all teaching and administrative personnel need not be considered until the possible detrimental effects of such an order upon the administration of the schools and the efficiency of their staffs can be appraised along with the need for such an order in aid of protection of the constitutional rights of pupils."

But the Supreme Court declared this would not do, and in **Bradley v. School Board, 382 U. S. 103 (1965)**, remanded the case to require the Richmond School Board to proceed with study and resolution of the faculty integration question, stating:

> "There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative." 382 U. S. at 105.

The **Bradley** opinion was followed by **Rogers v. Paul, et al.**, 382 U. S. 198 (1965); once again the Supreme Court remanded the cause for consideration of the faculty desegregation problem.

The District Judge in the matter now before us did hear some evidence on the question of faculty desegregation and concluded:

> "We do not believe that the proof of the plaintiffs is sufficiently strong to entitle them to an order requiring integration of the faculties and principals." 244 F. Supp. at 364.

He did, however, attack a then current policy of the school authorities whereby white teachers and Negro teachers, "simply because of their race," were respectively assigned only to schools whose pupils were all or predominantly of that teacher's race. The order implementing his decision contained the following:

> "The application of plaintiffs for an order requiring integration of faculty is at this time denied. However, the policy of defendants of assigning white teachers only to schools in which the pupils are all or predominantly white and Negro teachers only to schools in which the pupils are all Negro is by this order rescinded to the extent that white teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly Negro, and Negro teachers, who so desire, will not be barred from teaching in schools in which the pupils are all or predominantly white.
>
> To implement this change in policy, defendants must forthwith, as to substitute teachers, and each year beginning with the year 1966-67, as to all teachers, publicize it and obtain from each teacher an indication of willingness or an indication of objection to teaching in a school in which the pupils are all or predominantly of the other race. All teachers

who indicate such a willingness will be assigned to schools without consideration of the teacher or the pupils, but all other usual factors may be considered in assigning teachers. Nothing in this order, however, will be construed as requiring the assignment of an objecting teacher to a school in which the pupils are all or predominantly of the other race or will be construed as requiring a refusal to employ or a dismissal of a teacher who objects to teaching in such a school. This change in policy will be effective as to substitute teachers during the remainder of the school year 1965-66 and as to all teachers beginning with the school year 1966-67."

We note that this order was handed down before **Bradley v. School Bd.**, *supra*, and we are constrained to hold that it does not commit or require the school authorities to adopt an adequate program of faculty desegregation which will pass muster under the implied command of the **Bradley** case. Whatever **Bradley's** clear language, we cannot read it otherwise than as forbidding laissez faire handling of faculty desegregation. It implies that the accomplishment of that goal cannot be left to the free choice of the teachers and that the Board must exercise its authority in making faculty assignments so as to assist in bringing to fruition the predicted benefits of school desegregation.

No Supreme Court decision, however, has as yet provided a blue print that will achieve faculty desegregation. The United States Office of Education has indicated that, in some affirmative way, school boards must act to correct past discriminatory practices in the assignment of teachers.[2] But its recommendations do not have the force

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[2] "§ 181.13 Faculty and Staff

(a) **Desegregation of Staff.** The racial composition of the professional staff of a school system, and of the schools in the system, must be considered in determining whether students are

of law; neither does it provide clear guidelines to make easy the job of school boards in dealing with this problem. It will be difficult to eliminate the forcing of people into places and positions because of race and at the same time compulsorily assign a school teacher on the basis of his or her race.

It is sufficient for us to say now that the formula announced by the District Judge, leaving the decision of integration of the faculties to the voluntary choice of the

---

subjected to discrimination in educational programs. Each school system is responsible for correcting the effects of all past discriminatory practices in the assignment of teachers and other professional staff.

(b) **New assignments.** Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments.

* * * * * * * *

(d) **Past assignments.** The pattern of assignment of teachers and other professional staff among the various schools of a system may not be such that schools are identifiable as intended for students of a particular race, color, or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race. Each school system has a positive duty to make staff assignments and reassignments necessary to eliminate past discriminatory assignment patterns. Staff desegregation for the 1966-67 school year must include significant progress beyond what was accomplished for the 1965-66 school year in the desegregation of teachers assigned to schools on a regular full-time basis. Patterns of staff assignment to initiate staff desegregation might include, for example: (1) Some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff, of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully.

teachers, does not obey current judicial commands. We, therefore, remand this phase of the litigation to the District Judge to reconsider upon a further evidentiary hearing the matter of faculty desegregation.

4) Desegregation of Teachers Organizations.

It appears that at the time of the hearing in the District Court there existed in Tennessee two voluntary organizations, the Tennessee Education Association, whose membership was confined to white teachers, and the Tennessee Education Congress, made up of Negro teachers. Traditionally, the School Board allowed separate holidays to permit the members of these organizations to attend so-called "teacher in-training" programs. The District Judge dealt with this subject as follows:

> "Plaintiffs also seek an order prohibiting segregation of teacher in-service training. Although the proof is not completely clear, it appears that the only such segregation that remains results from the fact that the white teachers and the Negro teachers are members of separate professional organizations. It appears without dispute that defendants do not control the policies of these organizations. In any event, as heretofore indicated, the Mapp case, supra, holds that plaintiffs have no standing to assert any constitutional claims that the teachers may have and may assert a claim for teacher desegregation only in support of their constitutional right, as pupils, to an abolition of discrimination based on race. The assertion by plaintiffs that what remains of segregation in teacher in-service training has an effect on their right as pupils is, on the proof in this case extremely tenuous. We deny this application for relief." 244 F. Supp. at 365.

The evidence on this subject is too meager to permit us to evaluate the extent to which the school authorities participated in or aided the activities of these separate

teacher organizations, and the degree to which membership by the teachers in them would, in turn, affect the rights of the pupils. It appears, however, that these in-service training programs for teachers are conducted pursuant to state law, and are financed with public funds.[3] We make clear that the plaintiff pupils do have standing to assert that the existence of separate teacher organizations based on race and the school authorities' cooperation with their separated activities such as the in-training program "impairs the students' rights to an education free from any consideration of race." **Mapp v. Board,** *supra,* **319 F. (2) at 576.** If the District Judge's above quoted language can be read as a contrary holding, it is error. We also remand this issue to the District Judge for further consideration.

5) The Jackson Symphony Orchestra.

It appeared that the Jackson Symphony Association, with permission of the school authorities, arranged for a program by the Jackson Symphony Orchestra at one of the Jackson schools. The ladies in charge of this event invited the children in several grades of the Jackson City Schools, the County schools, and the Catholic schools. Those students included some from the all-white schools, and some from the schools, public and parochial, containing both Negro and white students. Students in all-Negro schools were not invited for the two performances involved. Testimony by one of the ladies of the Symphony Association denied any discriminatory motivation in the selection of the pupils, suggesting that the capacity of the auditorium was exhausted by those invited and in attendance. She said,

> "If we had room, we would have had every child in town there—fourth, fifth and sixth grades of every school, but we didn't have room."

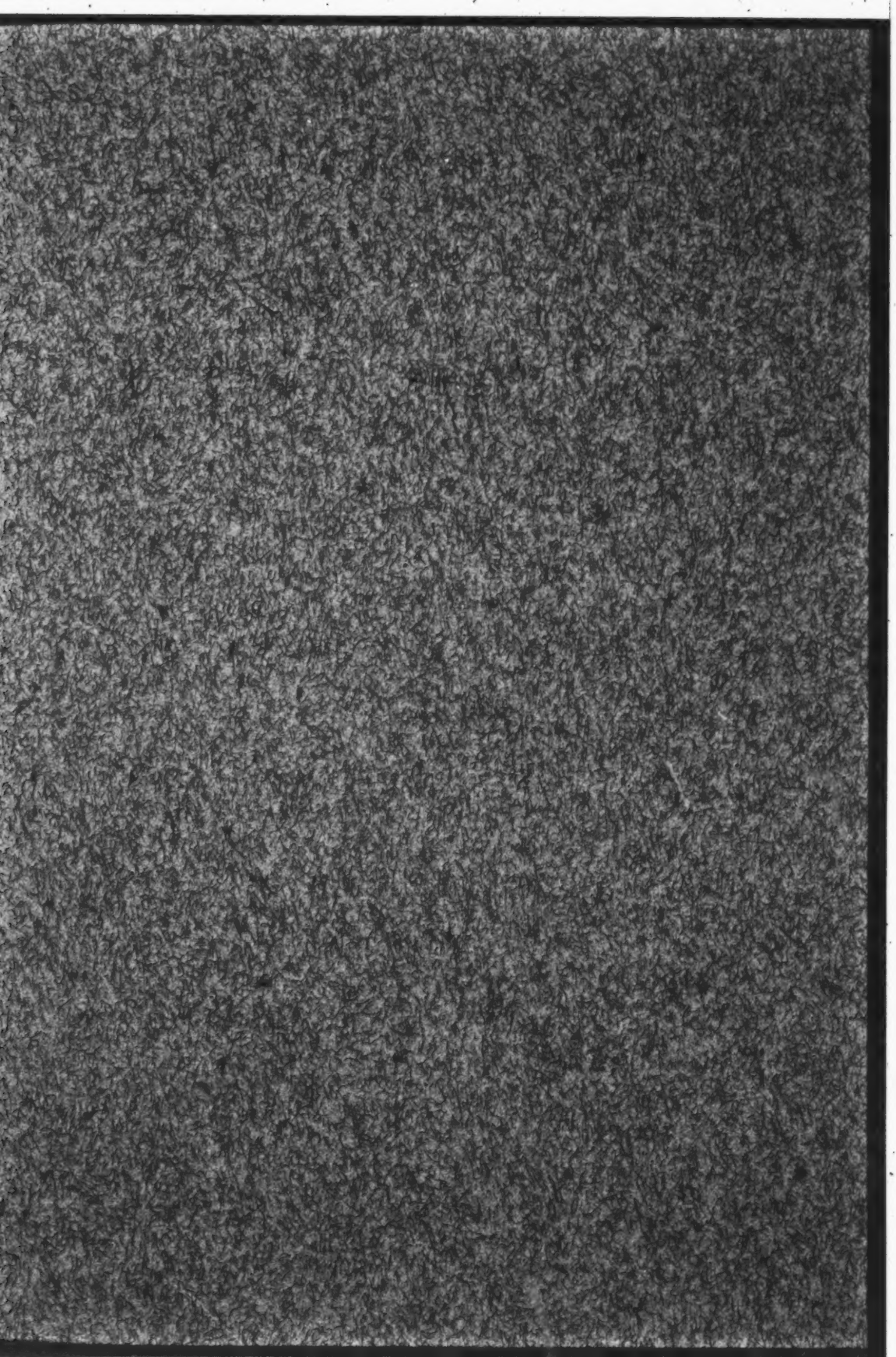
---

[3] See e. g., Chap. 76, Tenn. Public Acts, 1965, Sec. 24.

The school authorities had nothing to do with the matter of who was to be chosen to attend the concert. Its only participation was to allow the use of the auditorium. While it would be impermissible for school authorities to allow use of school facilities for entertainment that was discriminatory, nothing was developed by the evidence to cause us to criticize the District Judge's conclusion that the "defendants were not motivated by racial considerations" in their handling of this matter. **Monroe v. Board of Commissioners**, *supra*, **244 F. Supp. at 365.**

Another issue discussed by the District Judge, ... F. Supp. at ..., the so-called "split season," has been rendered moot by the elimination of the practice.

The cause is remanded to the District Judge for further consideration of the matter of faculty desegregation and teacher in-service training, and is otherwise affirmed.



SUPREME COURT, U. S.

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Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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EXPLANATORY STATEMENT

Although petitioners believe that our original petition for certiorari more than adequately indicates the necessity for granting certiorari, there have been three decisions, two from other Circuit Courts, one from a District Court, rendered since *Jefferson* which emphasize the great need for this Court to review the decision of the court below. The three decisions rendered since Jefferson are *Bowman v. County School Board of Charles City County, Virginia, et al.* No. 10793, 4th Circuit, (June 12, 1967); *Hobson v. Hansen and the Board of Education of the District of Columbia, et al.*, No. 82-66 decided in late

May or early June; and *Monroe v. Board of Commissioners, City of Jackson, Tennessee, et al.* and *County Board of Education, Madision County, Tennessee,* et al. Nos. 17118 & 17119, 6th Cir., (July 21, 1967).

However, opponents' brief in opposition contains certain statements to which we also feel some brief comment must be directed.

COMMENTS ON OPPONENTS' BRIEF IN OPPOSITION

The first portion of opponents' brief implies that petitioners have not submitted any argument in defense of the District Court desegregation plan in this case. This is not correct. We argued throughout our petition, particularly in Argument III beginning at Page 29, that each of the District Courts should be left free to formulate its own order or decree to fit the circumstances of each individual case before it. We reiterate that argument.

We recognize, however, that the District Court plan existing at the time this case was before the Fifth Circuit did not meet some of the requirements enunciated by the Court below although it did meet such requirements at the time the District Court issued its order. To that extent only, we recognize that our District Court plan must be modified.

Opponents, on the other hand, forget, or ignore, that the District Court plan in this case was approved July 15, 1965, two years ago. They also forget that this plan was a further modification of the plan approved in July of 1963. In fact, every time opponents

have requested a modification or up dating of our plan, their request has been granted by the District Court. Consequently, there is no doubt but that if opponents had filed a motion for further relief at any time after the present plan was approved in 1965, the District Court itself would have modified our present plan. Had the court below remanded with instructions to bring our plan in line with its pronouncements, there is no doubt that this would have been done and application for certiorari might not have been necessary. However, the oppressive and burdensome decree imposed by the court blow and its sweeping pronouncement of a radical change in constitutional requirements makes certiorari imperative.

Opponents also, at Page 12 of their brief, attempt to defend the different constitutional requirements established by the court below for states in this Circuit by adopting the same rationalizing as the court below. Opponents say, in referring to the charge of sectionalizing that "it is a truism if it merely describes the refusal of the court to decide issues presented in other parts of the country and *not present* on these records". (Emphasis added) We agree that the court "decided issues" not present on these records. Not one of these records contain any evidence as to a factual or legal difference between racial residential patterns in the states in this Circuit and the states in any other Circuit. And it is only by a conclusive finding of such difference that the statement of the court quoted by opponents can be justified.

(Opponents' brief, Page 12—Jefferson II, Page 5, Note 1).

Opponents' brief draws another conclusion to which comment must be directed. Pages 8 and 9 of opponents' brief contain these statements:

> "The main thrust of the petitions for certiorari —all the argument of bi-racial balancing, claims of conflicts of circuit, and protests that the special punishment is being visited on southern school boards—is the boards reaction to what they think *the opinion portends for the future.*" (emphasis added).
>
> "But the Court of Appeals' *promise for the future,* presents no litigable matter today." (emphasis added).

That petitioner is afraid of what the opinion portends for the future, is readily admitted. Look at what the court below says in *Jefferson I:*

> "The only school desegregation plan that meets constitutional standards is one that works." (Page 7)
>
> "The provision (HEW guidelines) referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation. . . . (Page 94).
>
> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect fifteen

> to eighteen percent of the pupil population to have selected desegregated schools." (Page 95).
>
> "If Brown I left any doubt as to the affirmative duty of states to furnish a *fully integrated* education to Negroes as a class, Brown II resolved that doubt." (Pages 5, 6 & 7). (Emphasis added)

Jefferson II continues the promise for the future by saying:

> "The court holds that boards and officials administering public schools in this circuit have the *affirmative duty* under the Fourteenth Amendment *to bring about an integrated* unitary school system. . . ." (Page 5) (Emphasis added)
>
> "Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize." (Page 5)
>
> "To the extent that earlier decisions of this court . . . conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion." (Page 6)

All of the above is now said in *Jefferson I* and *II* which is before this court on application for certiorari. Examination of prior decisions of the court below with respect to what "its opinion portends for the future" would seem to be in order.

Briggs v. Elliott, EDSC 1955, 132 Fed. Supp. 776, was decided by the Fourth Circuit in 1955, and was quoted with approval by the court below in at least ten cases during the ten year period from 1955 until 1965. The first criticism of that decision and its holding that:

> "The Constitution, in other words, does not require integration. It merely forbids segregation."

by the court below came in a single line footnote in *Singleton v. Jackson Municipal Separate School District*, 348 Fed. 2d 729, 730, Note 5. It was again criticized briefly in the second *Singleton* decision, 355 Fed. 2d. 865 in 1966 when it was referred to as an "oversimplified" construction of *Brown I*. It was next criticized in August, 1966, by the court below in *Davis v. Board of School Commissioners in Mobile County*, 364 Fed. 2d 896 in a brief footnote 1 as being "oversimplified dictum that the Constitution does not require integration". Yet, in December of 1966, the court below spends seven and one-half pages specifically overruling *Briggs* and its constitutional holding. (*Jefferson I*, Pages 39-47)

Thus, in less than two years, the court below has expanded a brief one line footnote criticism of one case and one constitutional principal into a ten page reversal of that case and principal and the absolute reversal of ten of its own decisions. See Jefferson II, Page 6, Footnote 3. If the court below can so expand a one line footnote criticism in two years should these boards not be afraid of what its many statements in this case, set forth above, "portend for the future"? Based upon the past history of the court below as "trail blazers" (Judge Coxe's dissent, Jefferson I, Page 150) the portent of the decision of the court below in this case can be no less than compulsory integration of students by forceably assigning them to

schools on some yet undetermined racial percentage basis, including forceable transporting from one end of the school system to the other and compulsory racial establishment of faculties also on some percentage basis. With this past history of the court below staring us in the face, does not the "court of appeals' promise for the future" present a "litigable matter" today? Must petitioners be relegated to the mere hope that this Court may, in some other case, in some other place, at some other time, review these constitutional issues and give us the relief that local public education needs? We respectfully pray not.

DISCUSSION OF DECISIONS SUBSEQUENT TO JEFFERSON

As mentioned in our opening statement, our primary reason for submitting this supplemental brief is the three decisions which have been rendered by other courts since *Jefferson*. The three decisions which have been rendered since *Jefferson*, one from the Fourth Circuit, one from the Sixth Circuit, and one by Circuit Judge Wright sitting by designation as the District Judge for the District of Columbia, have split so widely on their conception of Constitutional law that it is absolutely necessary that this Court grant our application for certiorari, review the issues involved, and undo the damage done by *Jefferson*.

The first decision in time since Jefferson is *Bowman v. County School Board of Charles City County, Virginia*, and its companion case. The majority opinion approved a freedom of choice plan and flatly rejected the future portent of *Jefferson* by specifically

rejecting the theory that plaintiffs were entitled to "compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices". *Bowman*, Page 1. Although this decision followed *Jefferson* to some degree it also further rejected *Jefferson* by remanding the case to the District Court for further hearings on the question of faculty desegregation with unfettered discretion, (as compared to *Jefferson*) left with the District Court, as was originally envisioned by *Brown II*, as to what decree or order he should fashion. The concurring opinion however, would appear to go much further in following *Jefferson* then did the majority. This is an example of one court using another court's decision as one more step in the ladder of building a new principal of law, (or body of social and political conduct), if that first decision is left to stand as though approved by this Court. Another, and far more significant, example of what the future portends if this court fails to review and reverse or modify *Jefferson*, is the decision in *Hobson v. Hanson* by the District Court of the District of Columbia. Although this is only a District Court decision, it is most important because it was decided by a member of a Circuit Court of Appeals. This decision does more damage to our system of law and to our system of local public education than any decision to date. To begin with, on the very first page of its decision, the Court establishes a new type of class which may bring a class action when it says,

> "The present litigation, brought in behalf of Negroes as well as *poor children generally* in the

district's public schools . . ." Hobson, Page 1. (Emphasis added)

This statement would be bad enough if it gave some definition of the class of "poor children". However, nowhere in the decision does the court ever define which persons would fit that one particular class. What are to be the criteria? May rich people or affluent people also bring a class action?

The court then proceeds into the field of education to abolish, among other things, the "track" system, socially homogeneous schools, and the neighborhood school system. It seems to make no difference whatsoever to the court that dedicated professional educators throughout this nation are still not agreed on the merits or demerits of the various types of "track" systems. Nor that most educators are convinced of the desirability of the neighborhood school system. Are judges and lawyers qualified by training or experience to substitute their judgment for that of professional educators or the people, generally, as to what is a good, better or best educational policy? The question would seem to be self answering.

Even the court itself admits, at page 179, that "the goal or objective toward which the school system should strive" is a ". . . more complex question". Admittedly, determining the best goals and objectives of an educational system is a most complex problem. *But, the issue that is here so critically important is not what the goals should be but who should make the decision.* Should not this be decided by the people through their elected school boards, state legislatures

and state departments of education through the utilization of the knowledge, training and experience of their *own* selected professional educators? It would even be preferable, both in law and in practice, to have these most important decisions made by Congress (although it is constitutionally doubtful that Congress has such authority) to having them made by the courts, even state courts.

The Court in *Hobson* finally admits the problem inherent in its decision in its "parting word" at page 180 wherein the Courts says:

> "It is regretable, of course, that in deciding this case, this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. . . ."

One may sympathize with the Court's desire to see our educational systems operated in a manner more suitable to the court's individual preference. However, the fact remains—a Court is a Court of law—not an administrative body—not a legislative body. The power and authority to decide what is good, better or best, educationally, for the people of this nation has never been tendered to the judiciary by the Constitution or by any act of Congress and this is as it should be. The people have elected representatives, school board members and legislators, as well as professional educators, qualified by training and experience, to assist them in deciding how their educational system should be operated and what its goals should

be. They have utilized this same, constitutionally correct, system to determine and resolve problems of old age security, public housing, fair labor standards, and other complex problems which "seem at times to defy . . . resolution" *Hobson*, page 180. This is the democratic way.

Although *Hobson* only affects the schools in the District of Columbia, it is important because it expresses the conclusion of an appellate court judge and because it relies heavily on the reasoning expressed in *Jefferson*. If *Jefferson* is an ancestor of *Hobson*, what will be its progeny?

The sum and substance of Judge Wright's decision in *Hobson* has been, perhaps, best stated by Alexander M. Bickel writing in *The New Republic*, Vol. 157, No. 2, Issue 2745, July 8, 1967 when he said:

> "What then is the use of such judgment? what is the use of a hortatory constitutional pronouncement urging Washington, D.C., to solve its social and economic problems? *Judge Wright's opinion might have been a document issued by some group of civic leaders, or some foundation or research organization, and whatever disagreement one might have had with this or that aspect of it, one would have welcomed its attention to the school problem.* But the Constitution and the judges who guard it have a well-defined role to play, which no one else can play. They are to address themselves to those features of the society with which law can deal, by defining rights, obligations and goals. No charitable organization and no study group can do that job, can invoke the power of

> government to those ends. It is no service to any worthy cause to saddle legal institutions with functions they cannot discharge, and to issue in the name of the law promises the courts cannot redeem." (emphasis added)

This is the danger of *Jefferson*. What Judge Wright has already done for Washington, D. C., *Jefferson* implies for the future for all school systems in the Fifth Circuit. This school board is entitled to know *now*, what the future holds in the way of court decreed educational policy. This Court must return the operation of our educational systems to the people and *their* professional educators.

The third case rendered since *Jefferson* and which again points up the split between the various circuits, as indicated in our original petition, is the case of *Monroe v. Board of Commissioners, City of Jackson, Tennessee, and the County Board of Education, Madison County, Tennessee*, decided July 21, 1967, by the Sixth Circuit. This case points up the absolute necessity for this court to review these issues and resolve these differences between the various Circuit Courts.

The *Monroe* case deals squarely with the question of "de facto" segregation as opposed to "de Jure" segregation, the distinction between the two, and the different rule of law imposed for the two by the court below.

The court discusses at length its decision in *Deal v. Cincinnati Board of Education*, 369 Fed. 2d 55 (CA 6, 1966), petition for cert filed, 35 LW 3394 (US

May 5, 1967) (1358) which dealt with a school system which had "de facto" segregation, a school system which had not had legal segregation at the time of the *Brown* decision. It noted also that in the instant case, Jackson, Tenn. and Madison County, Tenn. had not desegregated until after the *Brown* decision just as had the school board involved in this petition. The court then said:

> "We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. *We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states, which, prior to Brown, maintained a de jure bi-racial school system, than upon those in which the racial imbalance in its schools has come about from so called de facto segregation—this to be true even though the current problem be the same in each state.*" (Emphasis added)

The court then says:

> "We are asked to follow *United States v. Jefferson County Board of Education*, 372 Fed. 2d 836 (CA 5, 1966). . . ."

and then at page 4:

> "But to the extent the *United States v. Jefferson County Board of Education*, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in *Deal*, we respectfully decline to follow them".

In discussing this disparate rule of law between states, the Sixth Circuit also said:

> "However ugly and evil the bi-racial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the Legislatures of the states and the Nation—U.S. Constitution, Article 1, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law."

This is a clear conflict between circuits. This decision and the decision of the court below, together, mean that the Fourteenth Amendment means one thing in Madison County, Tennessee, but something entirely different in East Baton Rouge Parish, Louisiana. This difference should be resolved by this Court.

Although the Sixth Circuit in this case does indicate some necessity for faculty desegregation, it must be noted that the requirements it places on school boards in Tennessee is far, far different from those imposed by the court below on school boards in Louisiana. Even though it had the decision of the court below before it with its specific requirements as to faculty desegregation, and even though it acknowledged that this Court's decision in *Bradley v. School Board*, 382 U.S. 103 (1965) probably implied some

requirements as to faculty desegregation, it specifically refused to adopt the stringent requirements imposed by the Fifth Circuit in *Jefferson* and, furthermore, left the District Court with the discretion given it by law in fashioning appropriate orders and decrees for cases before it.

We respectfully submit that in view of its incorrect interpretation of Fourteenth Amendment requirements, the great budren it places upon local public education systems by its oppressive decree, and its conflict with the law as declared by other Circuit Courts of Appeal, both before and after its birth, the decision of the court below must be reviewed by this court and our application for certiorari should be granted.

Respectfully submitted,

JOHN F. WARD, JR.,
Counsel For Petitioner.

CERTIFICATE OF SERVICE

I, John F. Ward, Jr., attorney for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 21st day of September, 1967, I served copies of the foregoing Supplemental Brief In Support of Petition for Certiorari on all attorneys for respondents by mailing same, postage prepaid, to their respective offices as shown below:

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B-1087, 9-67

SUPREME COURT, U. S.

NO. 282

FILED
OCT 31 1967
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 9, 1967 denying the petition for writ of certiorari in this case and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed June 20, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Although, at the time of this Court's order of October 9, 1967, there was already a conflict of decisions between the various Circuit Courts of Appeal on some or all of the questions sought to be reviewed, since that time a further direct and explicit conflict has arisen.

In our original petition we pointed out what appears to be an apparent conflict between the decision of the Court below and many of the decisions of the other Circuit Courts. See original petition No. 282, P. 23. There are now two other cases from the Fourth and Sixth Circuit Courts of Appeal, *Bowman v. County School Board of Charles City County Virginia, et al.*, No. 10793, 4th Cir. (decided June 12, 1967) and *Monroe v. Board of Commissioners City of Jackson Tennessee, et al.*, and *County Board of Education of Madison County, Tennessee, et al.* Nos. 17118 and 17119, 6th Cir. (decided July 21, 1967), both decided subsequent to the decision of the Court below which are in direct and explicit conflict with at least portions of the decision of the Court below.

The conflict between *Jefferson* and *Bowman* is pointed up by the following statements of the two respective Circuit Courts. In the March 29, 1967 decision of the Fifth Circuit, sitting en banc, in *United States, et al. v. Jefferson County Board of Education, et al.*, the Court said at Page 5:

> "The Court holds that Boards and officials administering public schools in this Circuit have the *affirmative duty* under the Fourteenth Amendment *to bring about* an *integrated unitary school system* in which there are no Negro schools and no white schools, just schools. *Expressions in our earlier opinions distinguishing between integration and desegration must yield to this affirmative duty we now recognize . . .*" (Emphasis added)

Again, on Page 6 of that opinion, the Fifth Circuit said:

> "5. The percentages referred to in the guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, . . . the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; . . ."

and, further on at Page 7, the Court below said:

> 'In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. *These Guidelines establish minimum standards clearly applicable to disestablishing state sanctioned segregation . . .*" (Emphasis added)

Section 181.54, sub-paragraphs 1, 2, 3 and 4, of the HEW Guidelines referred to and adopted as minimum standards by the Court below, require at lease 15% to 20% of the Negro students to have chosen white schools for the 1966-67 school year for the freedom of choice plan to continue to be Constitutional. Even in 1967-68, in this school system, acting in accordance with and under the provisions of the *Jefferson* decision and decree, the Negro children have not chosen white schools in such percentages. Obviously, the Court below will now, or in the very near future, require compulsive assignment of Negro students in order to achieve the required percentages in this system. Yet, and in direct

and explicit conflict with the above quoted holding and result, the Fourth Circuit in *Bowman*, speaking through Chief Judge Haynsworth, specifically rejects such holding and result when it said at Page 2:

> "In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. *They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention*, though a related point affecting the assignment of teachers is not without merit." (Emphasis added)

The other decision of another Circuit Court of Appeal (Sixth Circuit) which is in direct and explicit conflict with the decision of the Court below, and which was rendered since the decision of the Court below, is the case of *Monroe v. Board of Commissioners, City of Jackson Tennessee, et al.*, supra, decided on July 21, 1967, subsequent to the filing of our petition for certiorari. As pointed out in our original petition for certiorari, the Court below has drawn a constitutional difference between so called de facto segregated school systems and so called de jure segregated school systems allegedly found in the Fifth Circuit. *Jefferson I*, Page 63, et seq., *Jefferson II*, Page 5, Footnote 1. The Sixth Circuit, which also decided *Deal v. Cincinnati Board of Education*, 369 F. 2d 55 (C.A.6, 1966), petition for Cert. filed, 35 L.W. 3394 (U.S. May 5, 1967) (Cert. denied October 9, 1967) which involved a so called de

facto segregated situation, in deciding the *Monroe* case, which involved a so called dejure segregated system identical to those in the Fifth Circuit, specifically rejected the constitutional distinction found by the Court below when it said at Page 3:

> 'We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states, which, prior to *Brown*, maintained a dejure bi-racial school system, than upon those in which the racial imbalance in its schools has come about from so called de facto segregation—this to be true even though the current problem be the same in each state".

Thus, we have yet another decision of another Circuit Court of Appeals rendered subsequent to Jefferson and subsequent to our petition for certiorari which is in direct and explicit conflict with the decision of the Court below.

2. Since our petition for certiorari was originally filed, another Circuit Court of Appeals has refused to follow Jefferson and two United States District Courts in other circuits have issued widely divergent orders, one following Jefferson and one apparently refusing to do so.

The United States Court of Appeals for the Eighth Circuit in the case of *Raney v. The Board of Education of the Gould School District*, No. 18527 filed August 9,

1967, Rehearing denied September 18, 1967, refused to follow Jefferson in at least three respects. First, the Court indicated that it had some doubt that a Court could enjoin a school construction program at all. At most, it found that it could do so only when such program "is designed to perpetuate segregation." (Raney, Page 3) This is at complete variance with *Jefferson* which in Section 7 of the Decree entitled "New Construction" provides that school boards shall "locate any new schools and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system." *Raney* follows the Fourteenth Amendment and *Brown* by prohibiting action "designed to" perpetuate a violation of the Fourteenth Amendment. *Jefferson* apparently means that you build and locate schools so as to attain a certain percentage of white and Negro students in each school regardless of such being educationally and financially unsound, or even financially impossible.

The Justice Department, in its motion for further relief recently filed in Civil Action No. 2921, *Williams, et al., v. Iberville Parish School Board*, affirmatively takes the position that the educationally sound "neighborhood school system" is now, under *Jefferson*, illegal and unlawful in the Fifth Circuit. If this Court did not intend such a result when it denied our application for certiorari, it needs to so advise the Justice Department and opposing counsel by granting our application for rehearing, granting certiorari, and clarifying for all parties concerned exactly what this Court means the law to be.

Raney is in further specific and explicit conflict with Jefferson in that it recognizes that a school board which has taken good faith steps to desegregate its system is entitled to a greater consideration and less stringent orders than some other school system which may have failed and refused to take any steps toward desegregation of its system. At page 9 of *Raney*, the Eighth Circuit said:

> "Plaintiffs alternately upon this appeal ask us to issue a comprehensive decree governing the desegregation process similar to that in *Kelley v. Altheimer*, Eighth Circuit, ...F. 2d..... (April 12, 1967). The record in this case does not warrant such relief. Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the board. Additionally, we find no substantial evidence to support a finding that the board was not proceeding to carry out the plan in good faith."

Raney is further in conflict with *Jefferson* in that the Eighth Circuit recognizes, as *Jefferson* did not with respect to the distinction between de jure and de facto segregation, that "issues not fairly raised in the District Court cannot ordinarily be considered upon appeal." *Hormel v. Helvering* 312 U.S. 552, 556; *Duignan v. United States*, 274 U.S. 195, 200; *Smith v. American Guild of Variety Artists*, 8th Circuit, 368 F.2d 511, 514."

In addition to *Raney*, there have been two District Court decisions, one from the Eastern District of North Carolina, Raleigh Division, and one from the Middle District of Georgia, Columbus Division, which

are so widely divergent in their interpretation of the law as to indicate clearly the necessity for review of *Jefferson* by this Court.

In the case of *Coppedge v. The Franklin Board of Education, United States of America, Intervenor, Civil No. 1796 of the Raleigh Division of the Eastern District of North Carolina*, the District Court not only follows *Jefferson* but even carries out its "portent for the future". The Court finds, in its Conclusions of Law, No. 3, at Page 14 of the opinion, that Negro students have not chosen to attend white schools under the freedom of choice plan in sufficient numbers to meet the requirements of the HEW Guidelines and that therefore the freedom of choice has become constitutionally impermissible. Thereupon, in the order and the decree attached to the opinion, the Court requires that school system to abandon its freedom of choice plan and present to the Court by October 15, 1967 "a plan for the assignment, at the earliest practicable date, of all students upon the basis of a unitary system of non-racial geographic attendance zones, or a plan for the consolidation of grades, or schools, or both." The Court then goes a step further and orders the school board, pending court approval of the new plan, to "transfer for the 1967-68 school year a sufficient number of Negro students to predominantly white schools so that at least 10% of the Negro students in the system will attend predominantly white schools." This is the final step before compulsory assignment of a certain percentage of Negro students to each school which *Jefferson* ultimately requires. *This*

will be the final result throughout the South, and only the South, if Jefferson is allowed to stand as the law of the land.

On the other hand, the United States District Court for the Middle District of Georgia, Columbus Division, in Civil Action No. 991, *Lockett v. Muskogee County School District, Georgia;* (Further action at the District Court level in *Lockett*, 342 F. 2d 225, 5th Cir., 1965) has now refused to follow *Jefferson*, at least in part, by refusing to issue the blanket detailed decree required by *Jefferson*. On Page 2 of its memorandum opinion and order, the United States District Court said:

> "Relying upon the decision of the Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education*, 372 F. 2d 836, counsel for the plaintiffs have now filed a motion for further relief asking in substance that this Court enter a blanket order in this case in the terms of *Jefferson*. A hearing on the plaintiff's motion was had and evidence was submitted. The defendant board assumed the burden of demonstrating that a decree of the nature and in the language of *Jefferson* was neither necessary nor desirable in the circumstances.

The Court then said at Page 10 of its memorandum opinion:

> "There is no evidence in this case that suggests the necessity for the entry of any further order at this time. . . . Where a local school board is earnestly striving to comply with constitutional requirements in the operation of its schools and is

> successfully doing so, *such a board should not be fettered with needless directions emanating from the Court.*" (Emphasis added)

Yet, as will be pointed out in more detail hereafter, when the District Court for the Eastern District of Louisiana, Baton Rouge Division, declined to hand all boards in his jurisdiction the blanket *Jefferson* Decree, he was summarily reversed by the Fifth Circuit Court of Appeals. It is also worth noting that although some school boards within the jurisdiction of the District Court for the Eastern District of Louisiana have been cited for contempt for failure to carry out a new choice period right at the opening of schools and although the Justice Department is now insisting, through a motion for further relief, that one school system reassign students even during the school year and even though a choice period was held during the spring, the District Court for the Middle District of Georgia, has refused to order such unnecessary and harmful action for the Muskogee County School Board. At page 9 of its memorandum opinion, the Court says:

> "It is also the opinion of the Court that to conduct another choice period at this late date and under the circumstances existing would bring about confusion in the functioning of the schools which are already completely organized and ready to begin operations next month. Instead of benefiting the program of desegregation, it is felt that the confusion resulting in the minds of the parents of the children would hinder the accomplishment of the objectives of desegregation."

It seems apparent that the Justice Department

and HEW consider Jefferson as having given them *carte blanche* to constantly harass school boards throughout the South, picking and choosing according to the personal whims of those in charge of those two departments in order to immediately force integration of the school systems. Not only do the school systems themselves need some direction from this Court, but we respectfully submit that the Justice Department and HEW also need some direction from this Court. Education for *all* children constantly deteriorates under such continued harassment.

3. In addition to the subsequent and intervening decisions mentioned above which are in direct and explicit conflict with at least portions of the decision of the Court below, we noted with interest that this Court on October 9, 1967 also refused to grant certiorari in the case of *Deal v. Cincinnati Board of Education*, 369 F. 2d 55 also decided by the Sixth Circuit. If *Deal* and *Jefferson* are not in direct and explicit conflict, the refusal of this Court to grant certiorari in both of these cases implies recognition and affirmance by this Court of a constitutional difference between Ohio and Louisiana. It implies an affirmance of different constitutional rights for the citizens of Ohio as compared to the citizens of Louisiana. The Negro children in *Deal* were asking for compulsory racial assignment to achieve a greater intermixture of the races. *Their demands were rejected by the Sixth Circuit.* The Negro children in the Court below were requesting, ultimately, compulsory racial assignment to achieve a greater intermixture of the races. *Their demands were*

granted by the Court below. Such a disparate application of constitutional principals to the citizens of various states should not be summarily decided by a mere refusal to grant certiorari in different cases.

If, on the other hand, by refusing to grant certiorari in these two cases, *Deal* and *Jefferson*, this Court only intended to indicate its approval of the finding by the Court below that segregated residential housing patterns in Cincinnati result from different causes than do segregated residential housing patterns in Baton Rouge, then this Court is approving a finding of fact by the Court below which is not supported by one iota of evidence in the record before the Court below and furthermore is approving a finding of fact which was not urged by any party in the Court below. There is no doubt that in many communities in Louisiana the Negroes and whites live in separate areas just as they do in Cincinnati, Ohio. There can also be no doubt that the reason for the Negro people and the white people tending to live in separate areas of a community is the same in Cincinnati as it is in Baton Rouge, i.e., one or both of the races has chosen to do so. Common sense indicates to anyone that the above is true. And, there is not one shred of evidence to the contrary in the record before the Court below. There can be no real doubt that the segregation which exists in the desegregated school system in Cincinnati is caused by this segregated residential housing pattern just as the segregation which results in the desegregated school system in Baton Rouge also results from this segregated housing pattern. There is no actual

factual difference between the two situations and the legal distinction drawn by the Court below is but a devious and invidious one designed to accomplish a desired result. *Such a fine, hair splitting distinction should not be allowed, by action of this Court in merely refusing certiorari, to create the application of such disparate constitutional principles to the various areas of this nation.*

4. Other intervening circumstances which we believe should justify this Court in granting our petition for re-hearing and issuing a writ of certiorari to review the judgment of the Court below are the happenings in the Fifth Circuit at the District Court level which have occurred subsequent to and under the provisions of the decision of the Court below and the detailed decree issued by it in Civil Action No. 2921, *Williams v. Iberville Parish School Board*, No. 3197 *Dunn v. Livingston Parish School Board*, Civil Action No. 3257 *Charles v. Ascension Parish School Board*, and Civil Action No. 3208 *Thomas v. West Baton Rouge Parish School Board.* In May of this year, the District Court for the Eastern District of Louisiana, Baton Rouge Division, declined to issue the decree of the Court below to all school boards within his jurisdiction feeling that he still had discretion, based upon the evidence presented in his Court, to fashion an order and decree suitable for each particular board under the circumstances, although his orders followed the decision of the Court below in requiring immediate desegregation of all grades for the 1967-68 school year and the commencement of faculty desegregation for

that same year. On appeal, the District Court was summarily reversed by the Court of Appeals without the appellees having an opportunity to be heard on the appeal. We know of no provision in the Federal Rules of Civil Procedure which authorizes such summary reversal. Thereafter, on August 7, 1967, the District Court issued the *Jefferson* Decree to all of the Boards in his jurisdiction. The decree ordered those school boards to hold a free choice period, between the dates August 1, 1967 and September 1, 1967, even though these Boards had already held a choice period in the spring under their previous Court Order. This order was not issued until August 7, 1967 and was not served on these Boards until approximately August 15, 1967. At this point all four boards had, many months before, scheduled school opening for the dates of August 28 through September 5. Obviously, these four Boards, not having been served with the new order until August 15, could not comply with its command to hold a new choice period commencing August 1. Two of the Boards attempted to comply by postponing school one week and holding a short bob-tailed two week choice period. These two Boards, Ascension Parish and West Baton Rouge Parish, employed principals and assistant principals on a 12 month basis and had the personnel to attempt such a task right at the opening of school. The other two Boards, Iberville Parish and Livingston Parish, have been financially unable to employ principals and assistant principals on a 12 month basis and employ them for only nine months of the year. Because of this, these two boards decided, as a matter of educa-

tional judgment, that they could not at that late date establish a new choice period and send out the notices, etc. required by Jefferson without completely disrupting the opening of schools as teachers had already been employed and assigned to schools, pupils had been assigned, etc.

All four of these Boards were served with a citation for civil contempt on Thursday, August 31 and Friday, September 1, the hearing having been noticed for Tuesday, September 5, the first day after the Labor Day holiday weekend. You can imagine the difficulty in preparing for such a serious hearing on such short notice. On the morning of the hearing, counsel for plaintiffs admitted that they had not taken the trouble to find out that two of the Boards, West Baton Rouge and Ascension, had attempted to hold an additional choice period in compliance with the specifics of the Jefferson decree, and moved the Court for dismissal of the contempt citation against those two Boards. A hearing was held on that same day on the contempt citation against the other two Boards, Iberville and Livingston Parish. The District Judge overruled all motions filed on behalf of the Iberville Parish School Board, including motion to dismiss because of insufficiency of process and insufficieney of service of process, motion to strike paragraph of complaint as improperly alleged and as immaterial, motion for judgment on the pleadings and, in the alternative, motion for summary judgment and motion for enlargement of time in which to plead and for continuance of the hearing on the rule to show cause. Plaintiffs pre-

sented no evidence in support of their citation for contempt except to call the superintendents of the two school boards whose testimony clearly indicated the difficulty of their position in attempting any such additional choice period at that late date, particularly when they had held a previous choice period in which all of the Negro children had been given ample opportunity to make a choice and in which great numbers of them had chosen to attend previously all white schools. The District Court found that under the circumstances there had been not intent to evade or disobey his order and that there had been good faith substantial compliance with same. His decision in finding these two Boards not in contempt of his own order is now on appeal to the Fifth Circuit Court of Appeals. It is interesting to note that although the United States Government is a party intervenor in these four suits, it did not join in filing the citations for contempt. Such action on the part of the plaintiffs in these circumstances is either the rankest type of harassment or else indicates a complete lack of concern for the welfare and education of all of the children attending that school system. A school system can not long continue to exist when its governing body and superintendent are being constantly harassed by legal action preventing them from carrying out the day to day operation of the school system.

In addition, on September 27, 1967 the United States Government noticed for hearing on October 20, 1967, a new motion for further relief in the Iberville School Board case, Civil Action No. 2921, which motion

requested: (1) the assignment of at least two white teachers to every Negro school and two Negro teachers to each white school even though this school board had already assigned some white teachers to Negro schools and some Negro teachers to white schools; the enjoinment of the school board from all planning or construction of schools at two presently proposed sites which have already been purchased by the board; and (3) the reassignment of both Negro and white children in the middle of the school year. In support of this motion, the Government issued subpoenas to the superintendent of schools for Iberville Parish and the President of the Iberville Parish School Board requiring them to produce on October 6, the proposed date of deposition, a volume of detailed information, documents, correspondence, etc. This necessitated the superintendent dropping everything else to do with the proper operation of his educational system just to try to compile the information required by the subpoena.

In addition, the Department of Health, Education and Welfare has now sent all school boards, even though they are under court order, numerous forms to be filled out containing detailed information, some of which has already been submitted to the Court under the Jefferson decree. This also further burdens the proper operation of an educational system.

This is the type of harassment that all boards throughout the Fifth Circuit will have to contend with if Jefferson is allowed to stand, even impliedly under a denial of certiorari, as the law of the land. *It is impossible to properly operate an educational system any-*

where under these conditions. It virtually requires a school board to clear with HEW, the Justice Department, the District Judge, opposing counsel, both locally and in New Orleans and New York, before doing anything. It appears that any action taken by a Board which has not previously been okayed by all of those agencies or persons will result in the Board being noticed into court for further punishment. We respectfully submit that neither the Brown decision nor any other decision of this Court ever contemplated the operation of a school system under such conditions.

Furthermore, while this Application for Re-Hearing was being prepared the United States District Court for the Eastern District of Louisiana, New Orleans Division, in the case of *Moses v. Washington Parish School Board,* et al, Civil Action No. 15973, has already taken the further step implied as the "portent for the future" of *Jefferson.* On October 19, 1967, that Court issued an Order requiring the Washington Parish School Board to submit to it, by November 15, 1967, maps and supplemental data establishing single geographic school districts to be put into effect for the second semester of this school year. It requires them to abandon the freedom of choice plan under which the school system had been operating. This, even though the Court specifically did not find "that 'free choice' has not 'worked' to integrate the school system . . .", nor did the Court "abolish the system because we have found the choice of the students forced by the state or external influences and not in fact 'free'; . . ." (*Moses*

v. Washington Parish School Board—Memorandum Opinion, pages 14 & 15)

Instead, the Court, without any reference to any evidence or testimony, appears to conclude that, *in his opinion*, a single geographic zone system is educationally and administratively preferable. It appears from the several quotations therefrom that the District Court both rejects and relies on *Jefferson* and also relies on the recent decision in *Hobson v. Hanson*, ...Fed.2d..... (D.C.D.C. 1967) to make this educational decision. We have previously, in our supplemental brief in support of certiorari, commented at length on the improper assumption of educational authority in *Hobson*. No Court, to our knowledge, has ever cited any constitutional authority for the courts to assume the burden of making educational decisions for local school boards.

In addition to the court entering a field "alien to its expertise, its complete lack of understanding of the problems involved in operating a school system is emphasized by the fact that it gave the defendant school board less than thirty (30) days to present such single geographic zone plan. This is physically impossible. Many of the schools in a small school system have different curriculums. Many of the schools contain different grade levels. For example, one school may contain grades 1 through 6 while another school contains only grades 1 through 4. Another school may contain grades 1 through 12 while another contains only grades 8 through 12. One school may provide only 25 units of subject matter while another may provide 32 units.

These factors have resulted, at least in part, from the financial limitations of the school systems over the past 25 or 50 years when certain schools were being constructed. All of these factors must be taken into consideration in attempting to formulate a single geographic zone system and must be considered in relation to the physical residence of each child in the system and the grade level at which that child happens to be. *It is impossible for this volume of information to be gathered and properly corrolated for an educationally reasonable single geographic zone system to be formulated within the short time given this School Board.*

If the Court is going to require a particular school system to go to a single geographic zone system, the very least that it should do, from an educational and administrative standpoint, is to give the school board ample time to gather and corrolate such information, as, for example, not requiring the zone system to be implemented until the following school year. Furthermore, the court completely overlooks the educational hardship imposed upon *all* students in the system by being so disrupted in the middle of the school year.

Because of the conflict between decisions of the other Circuit Courts of Appeal and the decision of the Court below, as previously set forth in our petition for certiorari, and particularly because of the direct and explicit conflict between the decision of the Court below and the decision of the Court of Appeals for the Sixth Circuit in *Monroe v. Board of Commissioners, City of Jackson, Tenn., et al.* Nos. 17118 and 17119, decided July 21, 1967, and *Raney v. The Board of Edu-*

cation of the Gould School District, No. 18,527 (Eighth Circuit) filed August 9, 1967, rehearing denied September 18, 1967, it is clear that the Court has authority and justification under its prior decisions to grant this petition for rehearing and issue a writ of certiorari.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari and supplemental brief in support thereof, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed June 20, 1967.

Respectfully submitted,

By Attorneys:

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By: _____

John F. Ward, Jr.,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

John F. Ward, Jr.,
Counsel for Petitioner.

CERTIFICATE OF SERVICE

I, John F. Ward, Jr., attorney for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 31st day of October, 1967, I served copies of the foregoing application for Rehearing of Order Denying Petition for Writ of Certiorari on all attorneys for respondents by mailing same, postage prepaid, to their respective offices as shown below:

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